Serial Working Paper on Legal Pluralism in Indonesia

The Study Of Law And Punishment In Islam

The Ideal Concept of *Hudūd* and Its Practices

NASIONAL COMMISSION ON VIOLENCE AGAINST WOMEN
KOMNAS PEREMPUAN
KOMISI NASIONAL ANTI KEKERASAN TERHADAP PEREMPUAN

NATIONAL COMMISSION ON
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The Study Of Law And Punishment In Islam:
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ISBN: 978-602-330-017-4

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Published by
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Jalan Latuharhari No. 4B
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Year:
2016

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This program and publication can be established with the support of the Embassy of Norway. The opinions expressed in this manual are entirely the responsibility of the Komnas Perempuan and do not represent the opinions or positions of the funding agencies that contributed to planning, development, and implementation of this publication.

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Preface

This book, *The Study of Law and Punishment in Islam: the Ideal Concept of Hudūd and Its Practices,* was written by two experts in *fiqh* (Islamic jurisprudence) and *tafsir* (Quranic interpretation), Dr. Nur Rofi'ah and Imam Nakhe'i, M.H.I.

This book is part of the serial working paper on Legal Pluralism in Indonesia, initiated by Komnas Perempuan in responding to the problem of legal pluralism in Indonesia and its challenges in standing for justice for women and humanity. It argues for Islamic legal theory from the perspective of Islamic theology, particularly about the contextualization of Islamic law in accordance with diverse situations in Indonesia. It also describes the contexts of the application of Islamic law at the time of Prophet Muhammad (the beginning of Islamic law), in the period of the Prophet's Companions and their followers, at the time of the codification of Islamic law, and the period when Islam spread to various parts of the world, including Indonesia.

This book tries to present a theological view of Islamic law and to explain that the reality of Islamic law is not monolithic. The diversity of opinions on the implementation of Islamic law which cannot be reduced into a single form makes it very important to be known by public and the state officials amidst the emergence of strong aspiration to implement the Islamic criminal law as a 'positive law' in Indonesia. In particular, this book explains in depth the theory of *hudud,* the purpose of punishment in Islam, and the implementation of flogging in the context of Islamic studies, which would help bring justice and prosperity for people.

Komnas Perempuan believes that it is important to support this study as an effort to maintain the integrity of national legal system and to encourage the elimination of all forms of violence, inhumanity and humiliation against human values. With the enactment of Law No. 11 of 2006 on Aceh, the Indonesian government has provided room for the enactmentt of punishments other than those that are ruled in the Criminal Justice Act. This opportunity was then used by the Provincial Government

of Aceh to implement *hukum cambuk* (flogging) in Aceh, which has drawn criticism and condemnation from international community and a number of parties in the country. Through this book, Komnas Perempuan tries to provide public with the enriched knowledge of the context of the punishment in Islam and expand the space for more constructive dialogue among various parties in the framework of ensuring the fulfilment of the constitutional rights of citizens in the implementation of the Special Autonomy and Regional Autonomy.

In its process of writing, this book received feedbacks from a number of scholars in Islamic law, criminal law, constitutional law, anthropology of law, sociology of law, human rights and gender studies through two sessions of Focus Group Discussion. Some of the feedbacks are attached to the end of this book.

Finally, Komnas Perempuan would like to thank *Ibu* Dr. Nur Rofi'ah and *Bapak* Imam Nakhe'i, M.H.I. for writing this book full-heartedly in the midst of their packed activities. Our gratitude also goes to the scholars who gave feedbacks, improvements and suggestions to enhance the quality of this book. In particular, we would also like to thank *Bapak* K.H. Husein Muhammad, *Ibu* Andy Yentriyani and *Ibu* Kunthi Tridewi (the commissioners of Komnas Perempuan 2010-2014) for initiating this book and involving in the review process of the book and the Commissioners and the staffs of *Gugus Kerja Perempuan dalam Konstitusi dan Hukum Nasional* [Task Force of Women in Constitution and National Law) of Komnas Perempuan for helping the review process and the writing of this book. We hope that this book benefits society, especially jurisprudents and government officials and state officials, in giving adequate responses to the growing aspiration of implementing Islamic criminal law as 'positive law' in Indonesia.

Jakarta, 22 December 2016
Chairperson, Komnas Perempuan

Foreword

In Search for a Just and Humane System of Punishment in Islam

The current social, political, economic and cultural situations in the world show psychological nuances, which are full of restlessness, anxiety and frustration. In the Muslim world, particularly in the Middle East, these situations seem so real. Psychological expression is seen in the acts of violence in its various forms. Crises, conflicts, upheavals and wars between fellow-citizens occur almost every day in this region. Only God knows how many thousands of lives have been lost in vain. Political policy and law seem no longer in effect. Law is no longer capable of protecting human rights. Looking at this reality, some analysts say that the leaders of the Middle Eastern countries have failed to carry out their constitutional mandate to maintain social order and protect the rights of their citizens. This situation has inevitably incited the rise of various political and social movements, which are inspired by and based on religion. These movements try to offer new formulas to solve the problems of their countries and the humanitarian issues in a comprehensive way. They are often referred to as fundamentalist and radical religious groups.

Religion-based radicalism has now become a topic of serious conversation everywhere. It is a massive and militant movement. It has become a transnational movement spreading to various parts of the Muslim world, including Indonesia. Radicalism is an ideology that requires change,

replacement, and deconstruction of a system in a society using any possible ways, either violent or militaristic ones. Based on religious ideology and ultra conservative puritanism, it demands a total change in all aspects of society.

In the view of these movement activists, huhuman-made rules have failed to create a just and humane society. These rules should therefore be replaced by God's laws. Their main slogan is *In al-Hukm Illa Li Allah Yaqussh al-Haqq wa Huwa Khair al-Fashilin* (Laws belong only to Allah who conveys the truth and He is the best decision maker)". Other slogans they promote in a massive scale are *al-Islam Huwa al-Hall* (Islam is the solution), "Only God's laws can save humankind from a long misery in their lives", and "We must practice Islam in *kaaffah* (a comprehensive way)". They view Islamic law as *Syari`ah*.

W.C. Smith, a prominent professor in comparative religions, observes this phenomenon: "Themes of the movements in almost all parts of the world revolve around two things: a protest against internal moral decline and "external attack"." Contemporary Muslim writers view this phenomenon as a Muslim response to secularism and its dominance over the Islamic world, as well as to the crisis of leadership in the Muslim world. Thus, it seems clear that the Islamic movement is not only a response directed at the secular West, but also a resistance against everything considered the cause of frustration and oppression, both internally and externally.[1]

Post-*Reformasi* Indonesia

The phenomenon of "awakening" against the oppression has now come to cross geographical boundaries. It is a movement which is often referred to as "transnational movement". In Indonesia, the movement emerged after the phenomenal success of *reformasi* in 1998. At that time, the word "*reformasi"* (reformation) became a wonderful vocabulary in which the dreams of Indonesian people to be 'human' and 'Indonesian' were saved. A new era

1 Abdullahi Ahmed An-Na'im, *Dekonstruksi Syariah, Wacana Kebebasan Sipil, Hak Asasi Manusia dan Hubungan Internasional dalam Islam*, Lembaga Kajian Islam dan Sosial (LkiS) in cooperation with Penerbit Pustaka Pelajar, Yogyakarta, Edition I, November 1994, p. 9.

was born following massive shouts of citizens in all parts of the country to end a single political power, which had been centralized and repressive over the years. This centralization of power and control in almost all public policy and politics shut down the life of democracy and deprived the rights of expression and self-actualization of the Indonesian people.

Then, the *reformasi* gave birth to local autonomy. This paradigm is idealized as a new road or a way for the realization of democratic and just Indonesia on a larger scale and in a comprehensive way. Comprehensive and substantial democracy necessitate the involvement of all citizens in social and political decision making. It gives recognition, respect, protection of the basic human rights, equal rights for all citizens in all areas of life, liberty and the recognition of differences and diversity of social identity, ethnicity, religion, class, and so on. Democracy of that kind has always been a dream of all citizens of this nation in the past, the present and in the future.

However, in their development, the promises of autonomy with all the sweet and wonderful hopes have become blurred, no longer believed to be realized even in the near future. Democracy now seems to be an arena for various political powers to struggle over the interests of each self, group, community and religion. Every person, group or religious group is allowed to talk about anything and do everything to win the fight. In the name of democracy, majority-minority polarisation is utilized to be the final word. The wide open democratic space is also used by certain religious groups to make efforts for their interests, which potentially threaten the structure of the Republic of Indonesia. In these circumstances, the state seems to be no longer able to stand upright for the 1945 Constitution. This is the current situation in Indonesia, at least until today.

Qanun Jinayah

In the name of democracy, the political aspirations, which are mixed with religious beliefs and certain sectarian interests, have emerged in many parts of Indonesia. Perhaps, Nanggroe Aceh Darussalam (NAD) is the first province in Indonesia which persistently demands for the enforcement of such aspirations, which is then popularly called *Syari`ah*, in its entire areas.

The NAD government called the rules of Islamic law as *qanun*. Acehnese society considers that their aspiration has a solid legal basis in the Indonesian legislation system. *Qanun* is legislation in local government level that regulates the conducts of the Acehnese government and its people's life. This is mentioned in the Article 1, No. 21 of Regulation No. 11 the Year 2006 on the Government of Aceh. The process of formation of this *qanun* remains subject to the regulations of Law No. 12 the Year 2011 on the establishment of legislation regulation. On the basis of this law, the NAD government, in a relatively short time, has successfully issued a number of *qanun*, including the controversial *Qanun Jinayat*.

It is interesting that the ideas and measures that the NAD government takes in the implementation of Islamic law-based public policies have inspired other local goverments to adopt the above mentioned *qanun* of NAD. Komnas Perempuan notes that there were 421 local goverment regulations, known as *Peraturan Daerah* (Perda), which are based on and packed with religious interests in August 2016. Komnas Perempuan identifies these policies to be discriminatory, particularly gender-based discriminatory. There have been many critical views that public policies in regions other than NAD do not have a solid constitutional base. *Qanun* is a regional regulation which is typical to NAD.

Aceh Qanun No. 6 of 2014 on the Law of *Jinayah* is commonly called *Qanun Jinayah*. *Jinayah* is an Arabic word that can be translated as "criminal law". Thus, *Qanun Jinayah* is Regulation on Criminal Law. Actually, before tsunami struck "the Land of *Rencong* (Acehnese blade)" or "*Serambi Mekah* (Porch of Mecca)," the province of NAD had three *qanun* on *jinayah*: Qanun 12 of the Year 2003 on *Khamar* (alcoholic beverages) and the like, Qanun 13 of the Year 2003 on *Maisir* (gambling), and Qanun No. 14 of the Year 2003 on *khalwat* (seclusion/being together between a man and a woman who are not relatives or married). These three *qanuns* consist of criminal law dimension. With the enactment of *Qanun Jinayat,* which was passed unanimously in the plenary session of the House of Representatives of Aceh on 27 September 2014, the above-mentioned three *qanuns* were revoked and declared as no longer valid.

It is important to outline here that *Qanun Jinayah* is based on Islamic principles of legality, justice, balance, welfare, protection of human rights, and learning for communities. It is clear here that Acehnese Qanun Jinayah was made according to a legal system of particular religion, namely Islam. This is problematic both in relation to the Constitution of the Republic of Indonesia and to the plurality of citizens in terms of religion and gender. This fact shows that *Qanun Jinayah* contains discriminatory elements, which are not conducive to the relationships between people with various backgrounds. The exception that non-Muslim citizens are not obliged to adhere to *Qanun Jinayah* has actually violated the nature of public policy or law itself. In this context, it is interesting to note what Abdullahi Ahmed An-Na'im proposed:

"If devout Muslims want the penalties to be enacted by ignoring the religion of either the offenders or the victims, then they have to convince non-Muslims and secular Muslims about social benefits and penological justification of the enactment. In other words, the proposed legislation should be supported by all layers of population, including non-Muslims and secular Muslims; it cannot be applied simply due to the wishes of Muslim majority. In fact, in my opinion, the penalties that are cruel and hard are limited to few cases and applied only after a preparatory phase in which the economic conditions, educational and other general conditions that justify the application of the penalties have been established".[2]

It should also be noted that the NAD *Jinayah Qanun* is merely one example of Islamic criminal law in general. Fundamental theories and materials of the *Qanun Jinayah* basically refer to the materials of *jinayah* formulated in the literature on *fiqh* or Islamic law, written by Muslim jurists in the classical and medieval age. These Muslim jurists generally lived in the Middle East in the midst of their own particular social, cultural, political conditions. It is interesting, or precisely disturbing, and at the same time problematic, that the law and regulations written in this *fiqh* literature are considered, even believed, by Muslim majority in many countries around the

2 An-Na'im, *Dekonstruksi Syariah*, p. 257.

world to be relevant to be applied in modern nation-state and contemporary social life of the entire Muslim world.

The Philosophy *of Jinayah (Criminal Law)* in Islam

In the discourse of Islamic criminal law (*jinayat*), a number of crimes are given punishment with severe criminal penalties. These are (1) *Hirabah*, any act which is disruptive, destructive and harmful to public security; (2) *Zina Muhshan,* adultery committed by married persons, widows and widowers; (3) *Zina Ghair Muhshan,* fornication committed by unmarried persons or singles; (4) *Qadzaf,* accusation of adultery; (5) *Syurb al-Khamr,* drinking alcoholic drinks; and (6) *Sariqah,* theft. Some Islamic jurists include the act of *Murtad* (apostasy) in this group of major crimes.

Islamic scholars refer to these seven types of offense as *hudud* which literally means "boundaries" or "limit". In the context of Islamic criminal law, they mean the penalties which are explicitly set in the Qur'an and the Hadith of the Prophet. Both the Qur'an and Hadith are the highest legislative authorities. According to Islamic scholars, in *hudud*, there is no room for people to change and replace it and it must be implemented as it is. Human only have right to modify law in another form of punishment other than *hudud*, which called *ta'zir*, the penalty for violation of law, which are not mentioned in the Qur'an and the hadith of the Prophet.

There are various forms of punishment rendered to the perpetrators of *hudud*. These include flogging before the public for fornication and accusing someone of doing fornication without evidence. These penalties are imposed for fornication of *ghair muhshan* (unmarried persons). In the case of adultery of *muhshan* (married persons), the punishment is stoning to death. Hand amputation is a punishment for theft.

Another violation of law is intended murder of a human. In Islamic law, the penalty for this crime is *qisas.* In this context, the punishment of the perpetrator of intended murder is death penalty. However, if the victim's family forgives the perpetrator, the punishment could be replaced by a fine or *diyat* (The Quran, al-Baqarah/2: 178, al-Isra /17: 33, al-Maidah/5:32, al-Baqarah/2: 178-179).

The problem that has always been the focus of debate among jurists throughout history is the issue of what is the real purpose of a punishment. The Islamic jurists have different opinions on this matter. Some believe that penalty is intended as retaliation and penance. This is known as the concept of *jawabir* (retributions). This means that the penalty is considered an act of retaliation to crime on one side, and an act to free the offender from guilt or sin which would otherwise be punished by God in the Hereafter on another side. Based on this theory, perpetrators of crimes in Islam will not be able to escape the punishment because it is there in both sides; if an evil-doer has been sentenced in the this world, then he or she will not need to face another punishment in Hereafter. This view is based on a hadith of the Prophet:

مَنْ أَذْنَبَ ذَنْباً فَعُوقِبَ بِهِ فِى الدَّنْيَا لَنْ يُعَاقَبُ بِهِ فِى الْآخِرَةِ

"Anyone who commits a crime, then he is punished in the world, then it is the justice of God that He will not punish him again in the Hereafter".[3]

In the *Sahih al-Bukhari*, its is narrated: "Who committed a crime and then was sentenced in this world, then it was a retribution for him. But if he escaped the punishment in the world, he would be punished by God in Hereafter, unless He decided the other way".[4] In short, we may say that the purpose of punishment, according to this view, is to make a deterrent effect to perpetrators by giving him a sense of anguish she or he deserved, a kind that also experienced by the victim, and to free her or him from guilt and sin.

Other Islamic scholars view that punishment is not meant as a retaliation or liberation from sin. Punishment is intended more as a way to prevent people from doing evil. This concept is known in Islamic law as the concept of *zawajir* (preventions). Al Mawardi (d. 1075 CE) said: "The criminal punishments (*hudud*) are *zawajir* decreed by God so that people do not

3 Ahmad Fathi Bahansi, *Al-'Uqubah fi al Fiqh al Islami*, 1980, p. 14.

4 Al 'Aini, *Umdah al Qari*,Juz 23/275, hadith no. 4876.

break the law; it's a warning that they might receive pains if they violate the law."[5] He argued that this concept has wider positive effect for the system of life than merely punishment of the perpetrator.

Dr. Wahbah al Zuhaili, a prominent contemporary jurist, said:

نَرَى فُقَهَاءَنَا يُقَرِّرُونَ أَنَّ أَسَاسَ أَوْ مَنَاطَ الْعُقُوبَاتِ الْمُقَرَّرَةِ شَرْعاً هُوَ مَصْلَحَةُ النَّاسِ الْعَامَّةِ وَسَعَادَتُهُمْ. فَكُلُّ مَا يُحَقِّقُ مَصَالِحَ الْبَشَرِيَّةِ فَهُوَ مَشْرُوعٌ مَطْلُوبٌ لِاَنَّ الْمَقْصُودَ الْاَصْلِيَّ مِنْ مَشْرُوعِيَّةِ الْحُدُودِ وَالتَّعْزِيرَاتِ هُوَ زَجْرُ النَّاسِ وَرَدْعُهُمْ عَنِ ارْتِكَابِ الْمَحْظُورَاتِ وَتَرْكِ الْمأَمُورَاتِ دَفْعاً لِلْفَسَادِ فِى الْاَرْضِ وَمَنْعاً مِنْ إِلْحَاقِ الضَّرَرِ بِالْاَفْرَادِ وَالْمُجْتَمَعَاتِ. قَالَ ابنُ عَابِدِين : إِنَّ مَدَارَ الشَّرِيعَةِ بَعْدَ قَوَاعِدِ الْإِيمَانِ عَلَى حَسْمِ مَوَادِّ الْفَسَادِ لِبَقَاءِ الْعَالَمِ.

Our jurists affirm that the basic principles of punishment in Islamic Syari`ah are welfare and happiness of humankind. So everything we make to realize human welfare is a religious ideal. This is because the primary purpose of the enforcement of law both in *hudud* and *ta'zir* is to prevent people from committing crimes and to enjoin them to do good. It works also in order that they avoid doing destruction and harm to other people, individually and collectively. Ibn Abidin, an expert in Islamic law, said: "The crucial point in Islamic *Syari`ah* after the faith is to break the chain of destruction for the sake of survival of humanity in the world.[6]

5 Bahansi, *Al-Uqubah*, p. 14.

6 Wahbah al Zuhaili, *Al-Fiqh al-Islami wa Adillatuhu*, Dar al Fikr, Beirut, the Fourth edition, 2004, vol. VII, pp. 5550-5551.

Another Islamic scholar, Ibn Taymiyyah (1327M), said:

Punishment in Islam is created as a form of mercy of God to His servants. It was born out of compassion for His creatures and of desires for giving good to them. Therefore, people who are in charge of giving verdict to offenders should look for a better way to do the punishment, do as parents treat their naughty children or as a doctor to the patient.[7]

In the view of Ibn Taymiyyah, punishment is intended as a reformative way to change and improve the behaviour of the perpetrator. Fathi Bahansi, a contemporary expert in Islamic criminal law, said, "The penalty in a modern perspective has two tasks at the same time: to realize justice and to uphold social welfare (reformatories)."[8]

The above varied views would bring about different consequences. The first view (*jawabir;* retribution) would require the implementation of penalties just as laid down in the legal text. The sentence should not be replaced by another way. It is the only choice; the punishment for theft is cutting off hands, fornication is 100 lashes while for adultery is stoning to death. It should be implemented as it is. This view is generally followed by the adherents of the school of textual conservative and fundamentalist. They believe the enforcement of penalties as present in the sacred text is fair and beneficial, at the same time it also gives a deterrent effect to others. The second and the third opinions are in contrasts with this view. The second concept is *al-Zawajir* (deterrence) and the third is *al-Ta'dib* (educating, reformatory). Both these last concepts give the possibility for lawmakers or judges to replace the punishment written *by the book*, taking into account other forms of punishment that better meet their objectives, for example a short-time or life-time imprisonment, also forced labor. They would look at the effects of punishment rather than just doing *by the text*. Lastly, many legal experts converge all these concepts. They may want to say that penalty as written is the maximum punishment, but it is not the only one, it can

7 Bahansi, *Al-'Uqubah*, p. 14, cf. Ibn Taimiyah, *Fatawa Ibnu Taimiyah*, p. 171.

8 Bahansi, *Al-'Uqubah,* p. 23.

be replaced with another penalty. Perhaps even the death penalty could be eliminated altogether.

Towards a Humane Punishment that Respects Human Dignity

A brief description above provides knowledge and guidance to us that law in Islam, as in secular positive law, is intended as a mechanism or instrument to gain justice and benefit for humankind. The majority of the scholars in Islamic law also explain that the punishment is intended to achieve social justice and goodness on the one hand, and as a way to educate the convicts in order that they would not repeat their evil deeds and become good persons on the other side. Two effects intended by this penalty should get equal attention. Our attention on one side should not overlook the other. In other words, our concern with the interest of society at large not by itself makes us ignore our attention to the convicted individuals. Thus the rule of law following the sanctions should be formulated to avoid as far as possible, or even eliminate, all manners of cruelty which are inhumane and abusive to human dignity, while at the same time, justice, order, and public welfare can be realized.

Our evaluation of a law that it has met its normative objectives is rational and empirical in nature, in a way that it can be thought and exercized accordingly; it has nothing to do with the claim of truth in the scriptural texts, including those texts about law. This leads us to a thought that the rules of social law, including criminal law, which give specific injunction or literally written in scriptural and authentic sources can be considered as a mechanism of moral enforcement, because it is more acceptable as a divine solution to the social problems that exist in certain conditions. However, when the conditions change, it could happen that the rules of the law may fail to meet their objectives and therefore need to be re-examined.[9] Umar and Ibn Abbas, as has been stated, had already provided a good example of this problem.

9 Khalid Abou Fadl, *Melawan Tentara Tuhan*, Serambi, Jakarta, 2003, p. 155.

Finding the Effective Punishment

From this point of view, it is important for us to find effective and relevant rules to the context of our social life today. Some penalties may be effective in certain contexts, but may not be in another context. Hitting a naughty child or a wife who does *nusyuz* (rebellious against her husband) might be justified as a way to educate them might be appropriate and effective in some traditions in the past; but it might be no longer appropriate and effective anywhere now. Today's development shows that the mechanism to educate children or wives become increasingly varied; hitting or any contact to the body intended to hurt is not among the ways to educate them anymore. That is now considered to be outdated. In the context of times in which human values are upheld, penalties by torture and humiliation are seen by the current world of humanity is no longer relevant; the international community have agreed on the Convention against Torture. Indonesia also signed and ratified the Convention through Law No. 5 of 1998. This certainly brings a consequence that the State is obliged to eliminate the practice of torture and other cruel, inhuman punishment. Thus, a brief description above represents the views on *Jinayah* or Islamic Criminal Law written in Islamic sources as I understand them.

This book, *The Study of Law and Punishment in Islam: the Ideal Concept of Hudūd and Its Practices,* was written by Dr. Nur Rofi'ah and Imam Nakhe'i, M.H.I. The long title of this book gives me impression about the deep anxiety of the authors on the practice of Islamic criminal law that is still in formulation in various Muslim countries. It appears that the authors see with the sharp eye that the application of Islamic criminal law and its formulation contain serious problems of humanity. They are problematic as they include elements of discriminatory laws against human beings on the basis of religious beliefs. Indeed, in the countries that apply the laws of Syari`ah, non-Muslim citizens don't have equal constitution as their fellow-Muslim citizens. Although non-Muslim citizens obtain legal protection by the state, still they are treated as second-class citizens. It is as if they are "foreigners" in their own land. They are also problematic if compared to the modern legal system that continues to change and grow; no exception is also

to the international law and the international conventions that have been ratified by many Muslim countries in the world.

Moreover, the Islamic penal code (*hudud*) is still laden with the dictums of laws that discriminate against women. Formulas and implementation of *hudud* in various Islamic countries are generally considered not using the perspective of gender equality and gender justice. In the world of patriarchal cultures, legal circumstances such as this inevitably makes women in a position very vulnerable to violence, cruelty and inhumanity. The authors give examples of this through a criminal case of rape which necessitates witness of four men at the time and place of criminal act. These four men must stand as witnesses of "coercion and evidence." Without witnesses and evidence, this female victims of rape can be accused of committing zina and therefore is vulnerable of being flogged and even stoned to death. This happens because rape victims generally have difficulty in getting witnesses; so that if they report their cases of rape without bringing the witnesses, then they being flogged 80 times because of *qadzaf* (accusation of adultery without witnesses). If she is pregnant, she is flogged 100 times, since pregnancy is a proof of *zina*. This is what happened to Zarfan Bibi in Pakistan.

In a critical expression to the reality of gender-based discrimination, the authors of this book state:

Wherever the classical criminal law are reapplied in any form, almost all the subjects of flogging, imprisonment, or death by stoning for adultery, are women. In many cases, women are being dragged to court on the basis of mere allegations by family members or neighbors, or they were punished by state actors and society.

This book is interesting in many aspects. It does not only examine and criticize all subjects of *hudud*, but also dives into the level of the paradigm of Islamic law and the related methods of reading of Islamic texts. Paradigm constructed for this study refers to the paradigm of "*Maqasid al-Syari`ah*" or "objectives of Islamic law". This paradigm is essentially leading to efforts to realize the social systems that protect the basic human rights which include the right to life, the right of faith and express it, the right of thought and opinion, the right to healthy reproduction and the right to own property.

To achive these objectives, the legal system that is just and humane is built. This system is the most direct consequence of the major doctrine in Islamic theology, *tawhid* or monotheism.

In addition, I see that the views expressed in this book have a strong academic basis, because they are dug and traced from the sources of Islamic knowledge of both classical and contemporary with a high level of authority. Their references are very rich. The authors also explore comparative products of Islamic criminal law in many Muslim countries, its dynamics over time and all the debates that have yet been finished even today.

In brief, any analysis in this book shows serious intellectual (*ijtihad*) efforts to "re-contextualize" or even "reconstruct", not "deconstruct" the system of Islamic Criminal Law which has long been a tradition in Muslim societies. In my view, this is a very brave intellectual effort but commendable in the midst of rampant and widespread transnational movements of Islamization. A clear and honest reading of this book would make us understand that the efforts of those progressive intellectuals are actually based on a desire to restore Islam to its values of just and civilized humanity, namely Islam that respects human dignity without discrimination on any ground, which is democratic and *rahmatan li al-'alamin* (grace for all the worlds).

I hope this book will be useful as one of the main references for public policy makers in making legislation, which is concerned with Islamic criminal laws, especially in this country, Indonesia.

Cirebon, August 2015
Husein MuhammadIntroduction

"The Problems of the Application of Hudud in Modern States"

Hudūd is one of the topics in Islamic law that have incited controversy and tension, especially when applied in a modern country in which human rights have become a global ethic. This is due to, among other factors, the fact that the principles of human rights that emphasize the humanity of humankind (*insaniyatu al-insan*) have been seen in line with the mission and principles of Islam and Abrahamic religions, namely a belief the oneness of God (*tawhid*) and an obligation of creating benefits for humanity and environment *(rahmatan lil alamin*). The question, then, is not how to subdue the concept of human rights under Islam, let alone how to match the teachings of Islam with the concept of human rights, but rather how to understand *jinayah-hudūd* by taking into account the social changes that continue to occur, while sticking to the mission and principles of Islam.

Islam and Social Changes

For more than 1400 years, social changes have become challenges to the application of the teachings of Islam. During the Prophet Muhammad's apostolic years (around 23 years), drastic social changes occurred. At the beginning of its presence in Mecca, Islam had only few adherents, but when the Prophet died, it had become the religion of majority in the Arab lands. During his 23 years of mission, important events occured such as the migration of Muslims from Mecca to Medina (*hijra*). This event did not only mean a change of residence for Muslims, but also a milestone in Islamic propagation influenced by social changes. This is seen, among other examples, in the notion that there were fundamental differences between Quranic verses revealed in Mecca (*Makkiyyah*) and the ones in Medina

(*Madaniyyah*) as noted by *ulama* (Islamic religious scholars).[10]

One of the differences between Makiyyah and Madaniyyah verses as mentioned by the ulama is that the Makiyyah verses are short, but the Madaniyyah ones are long. According to Nasr Hamid Abu Zayd, this difference is related to the difference of the messages delivered by the Prophet Muhammad in his calling to Islam. In the period before the hijrah to Mecca, the Prophet used the approach of *indzar* (warnings). The verses of the Qur'an in this period deal with the struggle of the old concepts of thinking and attempt to change it with new ones. Thus, *indzar* is an act of creating the awareness about the existence of the damage within society and followed by an attempt to change it. Meanwhile, in the period after the hijrah to Medina, the Prophet used the approach of *risalah* aimed at building an ideology of a new society. As they delivered knowledge, the Madaniyyah verses used longer narration than the Makkiyyah ones.[11]

Another difference between the Makiyyah and Madaniyyah verses as discussed in the works on *Ulum al-Quran* (Quranic sciences) is that the former contain universal messages (*kulliyah)*, the strengthening of *tawhid*, and the teachings on moral ethics, whereas the later tend to regulate the particular relationships between God and human being and among humans (*juz'iyyah*). This fact demonstrates the occurrence of social change, which not only requires the changes in *da'wah* strategies, but also in *da'wah* contents.

This social change, which is seen as *sunnatullah* (God's law of nature), resulted in, among others, the change in the substance of Quranic verses as reflected in the difference of Makiyyah and Madaniyyah verses, and the gap between the textual and contextual clues, both between the text of a Quranic

10 *Ulama* mention some differences between Makiyyah and Madaniyyah Quranic verses. For example, Makiyyah verses generally use the general term *Ya ayyuhannas* (o humankind), whereas Madaniyyah verses use the more specisif term *Ya ayyuhalladzina amanu* (o people of the believers). The concept of Makkiyah and Madaniyyah is an important topic discussed within the Islamic literature deals with the Sciences of Qur'an such as the one written by Subhi Al-Salih, *Mabahis fi Ulum Al-Qur'an* (Beirut: Dar al-Ilmi al li-Malayin, 1988), p. 163-233.

11 Nasr Hamid Abu Zaid, *Mafhum an-Nash Dirasah fi Ulum Al-Qur'an* (Beirut: al-Markaz ats-Tsaqafi al-Arabi, 1996), 75-79.

verse and its context when it was revealed as well as between the text and the context of modernity. It is common that this gap has created dilemma, that is, whether we will choose the content of a particular Quranic verse or those of other verses among six thousands of Quranic verses, or choosing between the textual meanings of a verse or its contextual ones. For example, which verse on marriage we choose: a Quranic verse about polygamy or the one about monogamy? If we choose the verse on polygamy, should we understand it by considering its context when it was revealed to the Prophet Muhammad or by taking into account the practice of polygamy in modern times? These are few options that define the way we interact with the verses of the Qur'an. The similar choices also occur when we interact with the Hadith.

Umar bin Khattab, one of the Prophet's Companions, was known as a prominent Muslim figure who often took contextual meaning of Quranic verses. Many of his decisions were at odds with textual instructions of the Quranic verses.[12] Three examples are relevant here. He decided not cut off the hands of a thief although the verses of al-Ma'idah 5:38-39 clearly mention that punishment for thieves is cutting off their hand. His decision was made based on the fact that famine occured after nine month drought in Hijaz, Najd, and Tihana, at the end of year 6 of Hijri. The second, Umar instructed to whip *khamr* drinkers to 80 strokes while the Prophet Muhammad instructed to whip them to 40 strokes because he considered the growing number of drinkers and the 40 sroke-whipping punishment was inadequate and ineducative (*al-zajru*).[13] The third one, Umar did not give

12 Substantially, the views of Umar bin Khattab were not contradictory with the Qur'an and Sunnah. He not only read one verse, but also other verses, even the Prophet's Hadis including Hadis that has relational meaning with the Quran, al-Maidah/5:38-39. So he not only understood the Qur'an and as-Sunnah comprehensively, but also understood them contextually.

13 If *hudūd* was defined as a form of punishment whose form was directly governed by Allah and the Prophet, then the flogging of alcohol drinkers by as much as 80 times should have not been categorized as *hudūd* because Umar who started doing it after the Prophet's death. This narration is found in the books of Hadis, among others, *al-Muwatha* of Imam Malik (d. 179 a.h.) and *Saheeh Muslim* of Imam Muslim (d. 271 a.h.).

zakat to the group of *mu'allafah qulubuhum* whereas the Qur'an literally says that the group is eligible to receive it. In this case, Umar based his decision not on *qhat'iy al-dalalah* of the verse, but rather on the spirit of the verse, namely that in his time Islam had been strong, so it was no longer needed to persuade people to embrace Islam through seduction of wealth. This *ijtihad* of Umar in *fiqh* literature is called *ijtihad bi tahqiqi manath*.

The gap between the textual instructions of the Qur'an and social reality is getting increasingly wide as Muslim communities become more diverse and dispersed in different social contexts. In the early Islam, Muslim community did not question whether or not a Quranic verse was Makiyyah or Madaniyyah because both were equally relevant or there was no a serious gap between these types of verses and the social reality and between their textual meanings and the contextual ones. Applying the Madaniyyah verses meant applying the Makiyyah ones. A new problem arose after the social change has rapidly occurred, which brought Muslim community to face the option whether to choose a Makiyyah verse or a Madaniyyah one, select the Quranic verses with general instructions or the ones with specific instructions, and select textual meaning of a verse or its contextual one. To deal with this problem, the concept of *naskh* was born, which says that when the Makiyyah and Madaniyyah verses provide different guidance in responding to new issues, Madaniyyah verses should be prioritized, while Makiyyah ones are postponed of their application. In this context, the gap between the Qur'an and social change in general is resolved through the Makiyyah verses.

Social changes continue to occur and develop new issues (*al-masa'il al-fiqihiyah al-Mustajaddah*), which are not covered by the Quranic verses with particular meanings as seen in the Madaniyyah ones. The concept of *naskh* is no longer sufficent. The *ulama* responded to this issue by developing an approach of *ijtihad* that is based on common good (*ijtihad istishlahi*) using the methods of *istihsan, al-'urf, maslahah mursalah, qiyas* and *maqashid al-syari'ah. Istihsan* method developed by Abu Hanifah (80-150 AH) sees that it is better to apply particular arguments of Quranic verses (*juz'iyyah*) and

disregard the general propositions of the religious texts for the purposes of public interests. *Maslahah mursalah*, which was proposed by Imam Malik (93-179 AH), refers to any common good that is line with the principles of Islamic law, even though there is no religious text which support or reject it. *Qiyas*, which was developed by Imam Syafi'i (150-203 AH), is a method of analogy by which the judgment of the new issues are determined by the issues responded by the Quran (as seen particularly in the Madaniyyah verses and the Prophet's hadith that refer to specific cases) due to their similarity in cause-effect (*illat*). In this period, the textual meanings of the Madaniyyah verses were still relevant though they were no longer sufficient and these methods were simply aimed at responding to the new cases on which the Madaniyyah verses did not provide any judgments.

Now, Muslims live in an age in which social contexts are different from those of the Arab community during the time of the revelation of the Qur'an.[14] The gap between the Qur'anic texts (particulaly Madaniyyah verses) or the Hadith (especially the ones contain specific instructions) and the social reality is so wide so that the application of textual meaning of these religious texts can disturb the sense of justice. For example, the literal understanding and application of the verses on slavery, interreligious relationships, gender and *hudūd* would mean that Islam permits slavery, interreligious conflicts, discrimination against women, and the use of physical and deadly punishments as ways to deal with crimes. All this is certainly contradictory with the spirit and mission of Islam as a mercy to the worlds and a religion that glorifies human beings (*takrim al-insan*).

Modern Muslim scholars respond to this issue in different ways. Fazlur

14 Abdullah Saeed says: "The epoch making changes in the world over the past 150 years have affected Muslims as well as non-Muslim and altered significantly how we see the world. These changes are enormous: [1] Globalization, [2] Migration, [3] Scientific & technological revolutions, [4] Space exploration, [5] Archaeological discoveries, [6] Evolution and genetics, [7] Public education and literacy, [8] Increased understanding of the dignity of human person, [9] Greater interfaith interaction,[10]The emergence of nation-states (and the concept of equal citizenship), [11] Gender equality"(Abdullah Saeed, *Interpreting the Qur'an: Toward a Contemporary Approach*, London, Routledge, 2006).

Rahman (1919-1988), a Pakistani scholar, offers a method of 'double movement' contextual Quranic interpretation (*tafsir*). First, the Quranic verses need to be situated within the context where they were revealed in order to revive their fundamental and universal messages before their application in contemporary. Second, these universal messages then are brought to the contemporary situation as the foundation of formulating Islamic guidance for different current social contexts.[15] This method was developed as a response to textual and partial interpretation of Quranic verses about social and human interaction (*mu'amalah*), which, according to Rahman, abandoned the moral messages of the Quran. For example, in their interpretation of al-Maidah [5]:38, the textual interpreters focused on the criteria of thief to be punished, the value of stolen things, and the part of thief' hand to be cut off, but ignored the actual aims of the the Quranic ruling of the verse, namely "to prevent stealing, to reveal the cause of stealing and to restore the humanity of the thief". This textual and partial interpretation missed the ideas of improving the moral quality of society, eradicating the economic disparity and creating ecomomic social justice in order to prevent the acts of stealing in its various forms.

Following the above Rahman's method of contextual Quranic interpretation, the phrase *faqtha'u aydiyahuma* is not supposed to be interpreted as the actual-physical cutting of the thief's hands, but rather as an intruction to prevent their hands from stealing by creating moral and economic social justice. Unfortunately, this tends to be seen as erroneous Quranic interpretation.[16] In fact, this kind of interpretation is more relevant because the phrase *faqtha'u* not only has the literal meaning of physical instruction 'to cut off", but also the metaphorical meaning "to prevent" just like the word *ayd* which has the literal meaning of "hand" and metaphorical meaning of "power" or "urgent need that forces someone to steal". It is narrated

15 Fazlur Rahman's method of Quranic interpretation is basically in line with the method developed by the scholars of *usul al fiqh* (the principles of Islamic jurisprudence) known *as ijtihad bi tarjih al-manath* and *ijtihad bi tahqiq al-manath.*

16 Taufik Adnan Amal dan Syamsu Rizal Panggabean, *Tafsir Kontekstual Al-Qur'an Sebuah Kerangka Konseptual* (Bandung: Mizan, 1990), p. 31.

that Abbas bin Mirdas once exaggeratedly praised the Prophet Muhammad. As a response, the Prophet said to Bilal: *Faqtha' lisanahu*, which literally meant "cut off his tongue', but, what he meant actually "Make him stop praising me".[17] Another Quranic verse *Yadullah fauq aydihim* metaphorically means "the power of Allah is above the power of them", not the literal one "the hand of Allah is above their hands ".

Ashgar Ali Engineer (1939-2013), a Muslim scholar from India, also advovates the Quran's spirit of humanity. He views that the Quran was meant for all humankinds in all times, it contains meaningful particularities in order to be embraced by the Arab society to whom when it was revealed. Based on this, the Quranic verses are divided into two categories: normative and contextual verses. The first refers to the verses that are not related to Arabic culture and tradition, while the second contains ideas related with Arab culture and tradition. The normative verses can be applied anywhere and anytime, but the contextual ones need to be understood in their social-cultural settings before their application in order to keep their transcendental-normative spirits. Otherwise, we may fail to reach the true guidance of the verses.

Engineer applied this approach to the interpretation of the Quranic verses on gender relations. The punishment set in the Quranic verses is closely related to the Arabic culture in which the verses were revealed and how the Prophet Muhammad put them in practice during his lifetime. The hand cutting set as a punishment for theft had been known among the Arab society long before the coming of Islam. The Quranic verse was revealed in the second half of the Prophet Muhammad's apostolic period when the Muslim community had been able to establish an economic system that guaranteed the poor could meet their basic needs through *zakat* and *sadaqah*, which were collected and distributed by the ruler. This system contributed to the absence of theft due to hunger and poverty so that when someone was found stealing, it was much more attributed to his or her habit or intention

17 Abu as-Sa'ud al-Imadi, *Al-Mausu'ah al-Kutiah al-Fiqhiyah*, vol. 11, p. 160.

to steal.[18] In this context, a ruler is not allowed to apply the hand cut as a punishment if he or she is still unable to establish a system of economy that easily provides people with facilities to meet their basic needs.[19]

Nasr Hamid Abu Zaid (1943-2010), a Muslim scholar from Egypt, offers the method of 'productive reading' (*al-qira`ah al-muntijah*). He views that the Quran is an open *corpus* which enables its readers to produce different and diverse understanding. This understanding can be divided into two categories: *al-ma'na* (meaning) and *al-maghza* (significance). *Al-ma'na* refers to an original Quranic meaning which is taken from the historical context of the Quran. *Al-maghza* is defined as an understanding which is derived from a dialogue between the original meaning of a Quranic text and the context that influences the reader. This dialogical process gives rise to new and relevant meanings to the challenges of modernity. This can be seen in the Quranic verses on *hudūd.* According to Abu Zayd, the punishments set in the Quran reflect a historical reality of Arab society in the 7th century so that they do not indicate specific divine imperatives which need to be applied all the times. In this case, the Quran does not intent to enforce this particular type of punishments (such as death sentence and hand cutting), but rather to establish its credibility by taking into account the local culture and contemporary civilization in its law system. Basically, these particular punishments are meant simply to be giving punishment for crime.[20]

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18 Regarding the hand amputation, the Qur'an uses the form of *fa'il* that refers to the actor, not the form of *fi'il* (verb), in the verse on the punishment for the case of theft, namely *al-sarik* (the thief), indicating that the punishment is given to someone who make stealing as his or her profession in their attempt to accumulate wealth.

19 Asghar Ali Engineer, *Islam dan Teologi Pembebasan,* Indonesian translation by Agung Prihantoro (Yogya: Pustaka Pelajar, 2000), p. 255-268. Engineer emphasizes the relationship between the Quranic verses and the Arab context in his discussion of women issues in his book *Hak-hak Perempuan dalam Islam,* Indonesian translation by Farid Wajdi dan Cici Farkha Assegaf (Yogya: LSPPA, 1994).

20 Nasr Hamid Abu Zaid, *Kritik Wacana Agama,* translation by Khiron Nahdiyyin (Yogyakarta: LKiS, 1994), p. 122-126; Nasr Hamid Abu Zayd and Esther R. Nelson, *Voice of an Exile Reflections on Islam, (Connecticut/London, Praeger: 2004),*p. 166 as cited in Dede Robi Rahman, *Al-Qur'an dan Teori Hermeneutika Nashr Hamid Abu Zayd,* https://elfaakir.wordpress.com/2011/11/21/teori-hermeneutika-terhadap-al-Quran

As mentioned in the *Qasidah Burdah li al-Imam al-Bushairi, 'ulama* believe that every single letter in the Quran has various meanings. Some even believe that one particular letter has sixty thousand meanings. If the number of letters in the Quran is believed to be 323.971, the meanings of the Quran will be abundant. The fact that there are many works on Quranic interpretation ranging from volumonious ones to a short ones indicates the efforts of *ulama* to reveal the hidden meanings of the Quran. This means that revealing the meanings of the Quran over time- in the past, now and in the future- is necessary and has been an unceasing duty for *ulama* of every generation. The *ulama* in the past developed an established methodology of Quranic interpretation aimed at revealing the meanings of the Quran. Yet, the contemporary *ulama* have not fully applied this methodology in their interpretation of the Quran.

However, these Muslim scholars with universal approach and humanistic understanding of the Quranic meanings, particularly those related to *hudūd,* are not in power in their Muslim countries. Though their ideas are important, they are not decision makers and have no authority to influence the implementation of *hudūd.*

An Overview of *Hudūd*

Crime (*jarimah*) in Islam is divided into three kinds: *hudūd, qishās and ta'zir*. *Jarimah hudūd* is an unlawful deed whose categories and penalties are prescribed in the Qur'an and Hadith such as *had sariqah, had zinā, had qadzaf,* and *had hirabah. Jarimah qishās* refers to punishment by doing *qishās* (legal retaliation) or *diyat* (blood money in replacement of *qishās*). Both *qishās* and *diyat* are the rights of a murder victim or his or her guardian to retaliate the convict or murderer. *Jarimah ta'zir* means punishment for offenses which are considered as either a violation of the rights of Allah (*haq al-Allah*) or the rights of human individuals (*haq al-'ibad*), whose forms are not prescribed in the Qur'an and Hadith, but rather at the discretion of the ruler or policy makers in line with public interests.

Ibn Rushd, in *Bidayatul Mujtahid,* mentions five categories of crime wirh sanctions and size are prescribed by *Syari'ah*

a. Crimes pertaining to human body and soul, namely murder (*al-qatl*) and wounding (*al-jarh*),
b. Sex crimes, namely adultery and prostitution (*sifah*),
c. Crimes pertaining to property, namely *hirabah* (robbery), *baghyu* (rebellion; overtaking legitimate power by waging war), *sariqah* (theft; stealing a treasure stored in a decent place), and *ghasb* (burglary; stealing a treasure by using violence).
d. Crime relating to person's integrity and honour, namely *qadzaf*.
e. The crime related to the consumption of food or beverages prohibited by *Syari`ah*. Islam, according to Ibn Rushd, mentions only one prohibited drink, namely *khamr*, intoxicant drinks normally made from wine or dates.[21]

Muslim religious authorities differ on the number of the forms of criminal offenses (*jinayat*) punishable with *hudūd*. Imam Hanafi only mentions five kinds of crimes, namely, *zina* (adultery), *qadzaf* (accusing someone of adultery), *sariqah* (theft), robbery (*hirabah*), and *khamr* consumption. Other religious authorities identify two more kinds of crimes, namely *al-qatl* (murder)and *al-riddah* (apostasy).[22]

In practice, there are six forms of punishment for perpetrators of criminal acts in the Muslim community:

1. Flogging, to sentence fornication (*zina ghayr muhshan*) with 100 strokes, people commited *qadzaf* with 80 strokes, and those who consumpt alcohol drinks with 40-80 strokes.

21 Ibn Rusyd, *Bidayatul Hidayah Analisa Fiqh Para Mujtahid,* translated by Imam Ghazali Said dan Achmad Zaidun (Jakarta: Pustaka Amani, 1989), vol. 3, p. 503.

22 Wahbah az-Zuhaili, *Al-Fiqh al-Islami wa Adillatuhu* (Damascus: Dar al-Fikr, 2002), vol. 7, p. 5675.

Whipping in the Saudi (www.eramuslim.com)

2. Cutting off the hands of thieves

Cutting off hands in Iran (www.viva.co.id) and in Syria (www.sergapntt.com)

3. Cutting off the hands and legs in a cross way for robbery without killing.

Cutting off the hands and legs cross (www.ajaranislamyanghaq.worspress.com)

4. Stoning for an adultery/*muhshan* (perpetrator bound by marriage).

Stoning to death in Afghanistan (http://www dhushara.com) in Pakistan (www.dailysahafat.com)

5. The death penalty for people who commit insurgency, murder without robbery, and apostasy

Hanging in Iran (www.republika.co.id)

6. The death penalty and exposing to public under the sun on a cross for robbery with murder.

Hanging on a cross in public in Saudi (www.globalvoicesonline.org)

Hudūd is believed to be a form of Islamic punishment because it is directly prescribed by God in the Qur'an or the traditions of the Prophet. It constitutes an Islamic identity; a country that has not implemented it is considered to be absent in implementing Islamic teachings in full. Brunei Darussalam has long declared itself as an Islamic state, but only in 2014 it began to implement *hudūd*. This indicates that the Sultan of Brunei believes that his country did not fully implemented Islamic Syari`ah until it enacted *hudūd* in practice. Similarly, some federal states of Malaysia, such as Kelantan and Trengganu, continue to fight for the application of *hudūd*.

The application of *hudūd* in Muslim countries is still a topic of a heated debate. The critiques believe that corporal punishments --death penalty (*qishās*) for murder, death penalty and exposureunder the sun in a public place, cutting off hands and legs for robbery, cutting off the hands of thieves, flogging for fornication, and stoning to death for adultery-- are inhumane, a violation of human rights, degrading of humanity, and contradictory to the purposes of *Syari`ah* (*maqashid al-Syari`ahh*). However, for the supporters of *hudūd*, the punishment must be applied regardless of social changes because the form and the size of the penalty are directly regulated by the Qur'an and the Hadith of the Prophet.

Ziauddin Sardar strongly criticises the implementation of *hudūd* in the current application of Islamic *Syari`ah* for some reasons. *First*, Islamic *Syari`ah* emphasizes forgiveness and balance, while the supporters of *Syari`ah* today emphasize the unforgiving form of punishment without considering of socio-political conditions. *Second*, Islamic Law opposes all forms of despotism, while the supporters of *Syari`ah* impose *Syari`ah* law in a despotic way. *Third*, Islamic *Syari`ah* advocates social-political justice and equality before the law, while its modern practitioners attempt to impose rules on people who are powerless, marginalized, minority and alienated groups, for whom *Syari`ah* doesn't have any significance at all. *Fourth*, some aspects of Islamic *Syari`ah* are not consistently enforced because they do not comply with Muslim rulers and their Western values, while other aspects of *Syari`ah* are overemphasized to fool the public that *"Syari`ah* law is being enforced".[23]

In the view of Nasr Hamid Abu Zaid, the demand for the application of *Syari`ah* law is not in line with social realities and contradictory with the main ideals of Islamic *Syari`ah,* especially in the case of the application of criminal laws. Reducing religious purposes to the law of stoning prostitutes, cutting off thieves' hands, flogging liquor drinkers, and so on, is opposing to the purposes of *Syari`ah* and the intent of the revelation of Sacred Texts.[24]

Hudūd and Women

Despite criticism, *hudūd* continues to be applied in some Muslim countries. This trend is not only found in Muslim countries in the Middle East, Africa, and South Asia, but also in Southeast Asia, including in Aceh, Indonesia. This development shows that the absence of *hudūd* implementation in one Muslim community doesn't necessarily indicate the absence of desire to implement *hudūd* in the near future. This absence of *hudūd* happens when there is no authority that has strong power to implement it. The models of

23 Ziauddin Sardar, *Kembali ke Masa Depan,* translation by R.Cecep Lukman Yasin dan Helmi Mustofa (Jakarta: Serambi, 2005), p. 101.

24 Nasr Hamid, *Mafhum an-Nash,* p. 14.

propaganda and ways of thinking promoted by certain Islamic groups in Indonesia in various ways including public religious lectures can be seen as a conditioning strategy until they have strong power to implement *hudūd*. The establishment of Islamic state or *khilafah islamiyyah* often makes the implementation of *hudūd* part of its progam.

Meanwhile, the formulation and implementation of *hudūd* in various countries generally do not consider justice from gender perspective so that they always put women in a vulnerable position. For example, literature on *fiqh* ignores "elements of coercion and evidence finding" in defining adultery which often results in the flogging or stoning of women victims of rape. It happens because rape victims generally have difficulty in bringing witnesses so that when a woman's report lack the required witnesses, she will flogged to 80 strokes for *qadzaf* (accusing someone of adultery without adequate witnesses). If she is pregnant, she will be flogged to 100 strokes as her pregnancy becomes evidence of her act of adultery. This happened to Zarfan Bibi in Pakistan.[25] In Nigeria, Bariya Ibrahim Magazu who was pregnant because of rape was punished to 180 lashes.[26] In many cases of the application of Islamic criminal law, women were sentenced to flogging, imprisonment, or stoning to death for adultery. There were many cases where women were taken to court on the basis of unsubstantiated allegations by members of their own family or neighbours or they were punished directly by individuals representing the state or society.[27]

The value of women's testimony, which is recognized only half of that of men in a civil case or even rejected in a criminal case, has caused other difficulties for women who have been raped. The testimony of the victims was not taken into account. Therefore, many of them were punished because of *qadzaf* through unadequate procedures. This was worsened by a belief that

25 Taufik Adnan Amal dan Samsu Rizal Panggabean, *Politik Syariat Islam dari Indonesia hingga Nigeria* (Jakarta: Pustaka Alvabet, 2004), p. 146.

26 Taufik dan Samsu, *Politik Syariat*, p. 130.

27 Ziba Mir Hosseini, *Memidanakan Seksualitas: Hukum Zina sebagai Kekerasan terhadap Perempuan dalam Konteks Islam* (n.d. : The Global Campain to Stop Killing and Stoning Women and WLUM, 2010), p. 10.

women are the sources of temptation so that they often fall victim twice that they are victims and at the same the target of public blaming (*revictimisation*). They were blamed for various reasons: for the kind of cloth they wear to being in a public space during the night. Then, for the sake of upholding Islamic *Syari`ah*, these women were sentenced as if they were committing adultery. Here justice as an Islamic ideal and value was not implemented in society.

Qadzaf and *li'an* are problematic so that both are often abused for the interests of men. Looking at the Qur'an 24: 4-10 on *qadzaf* and *li'an* (an attempt by husband or wife to evade *had qadzaf* when requited four witnesses are not met), it is clear that *qadzaf* prescribes 80 lashes for people who have no adequate evidence after accusing good women (*muhshanat*) of commiting adultery. Similarly, the law of *li'an* gives way to wives to cleanse themselves from accusation of adultery launched by their husbands. The wives can evade the charges by giving oath five times. However, the verses are often abused by rapists. They walk free from the accusation of rape by giving oath to five times. The ideal of the verses to protect women from being accused of commiting adultery without adequate evidence is abused to protect the rapists so that they can escape from the punishment.

Challenges

Another issue of the *hudūd* implementation in the modern context is the difference social contexts between Arab society during the revelation of the Qur'an and our society in this modern era. In pre-Islamic Arab society, like polygamy and slavery, killing and cutting off parts of the body such as ears, nose, and fingers were considered as natural acts, which had been embraced for ages. The Qur'an adopted these traditions by putting new ideals in them. Slavery was still permitted with the requirement of treating slaves in humane ways and giving them opportunities to be freed.The Qur'an also permitted polygamy with the requirements of four wives to maximum and a husband's ability to do justice and equality among his wives, while suggesting monogamy when such conditions are not met. Regarding *hudūd*, the Qur'an allows traditional ways of punishment, but prohibits excessive punishment

and opens the door of forgiveness, repentance, and compensation as new ways to replace them. The Qur'an is present to regulate the unfair practices of slavery, polygamy and *hudūd*; it does not instruct slavery and polygamy, and the implementation of *hudūd*.

However, the tendency to go back to the past is strong now. It equates Islamisation with Arabization, failing to distinguish between the values of the old Arab traditions and the new values introduced by the Qur'an and facing difficulties to break away from the patriarchal tradition of Arab society. Both in Arab and non-Arab countries, *hudūd* is often seen more as a universal norm than a way to bring Islamic justice and humanity which were closely related to the social context of the time of the Prophet.

This book was written as an attempt to voice the above-mentioned anxiety and to understand *hudūd* in a broader framework of the mission of Islam as the religion of Allah that upholds the values of humanity. The book is divided into three major parts: the problems faced by contemporary Muslim societies, Islamic legal theory that has been developed by Muslim jurists for centuries and efforts to reinterpret *hudūd* proposed by modern Muslim scholars. This attempt is legitimate because *hudūd*, as described in this book, is a concept that continues to be constested. Allah Knows the best.
Chapter One

The Construct Of Islamic Theology

Hudūd and *qishās* are believed to be parts of the construct of Islamic teachings. Indeed, some forms of *hudūd* are prescribed in the Qur'an and partly in the Hadith. Yet, in the modern context, *hudūd* and *qishas* are often considered outrageous and cruel practices, and contrary to human rights. This is based on a notion that the implementation of *hudūd* and *qishas* is taken off its theological basis and the *Syari`ah* is separated from its moral ethics. To separate *hudūd* and *qishas* from the whole construct of Islamic teachings is considered by many as potentially making a mess, both in perspectives and formulation, as well as in their applications. Its fatal outcome is the occurrence of procedural errors in which a victim of a crime who should be protected might be wrongly indicted before judge, while criminals who should be punished walk away freely and may repeat similar crimes without feeling of guilty. Although Islam does not recognize anyone or any party as above the law, the application of Islamic criminal law, however, treats people differently in accordance with their social classes and gender. Some groups have privileges over others, which are even written in the constitution of a state which mandates the application of Islamic criminal law.

It is important now to understand *hudūd* by referring to *ruh al-Syari`ah*, Islamic principles, universal values of *Syari`ah* and *maqhasid al-Syari`ah,* and by bringing the ideal concept of *hudūd* to modern society. This is meant to bring Islam to the worl as a religion of *rahmat li alamin* (grace for all worlds) and *takrim al-insan* (respect of humanity), not as a religion with scary faces and awful treatment of those of not-the-same kind.

A. *Tawhid* and Humanity as the Prophetic Missions

Tawhid is the heart of Islamic teachings. It is also the heart of the entire teachings of divine religions brought by all messengers of God from Adam to Muhammad. It is the heart of their Prophetic missions. *Tawhid* is not only understood as declaration of one's liberation from servitude to other than God, but also the one that defies deification of men as idols of power and wealth. It also liberates one from pride to oneself on the basis of religion, race, gender and ethnicity. In the hands of the Prophets, the principle of recognizing the oneness of God and denying the divinity of others except Him alone was like breath taken continuously in every step of human life. *Tawhid* influences the system of life, not only when one interacts with Allâh, but also when he or she interacts with his or her fellow human beings. The history of the Prophets was not full of resistance against *mustakbirin*, namely tyrannical rulers, proud princeses who loved to make others suffer, fraudulent businessmen, and religious leaders who abused religion for their own interests. In a power relation in society, religious leaders and communities who hold monotheism should not belong to a group power that tend to corrupt, but should be with the weak (*dlu'afa'*) and the attenuated (*mustadl'afin*), since these two parties often experience injustice. *Tawhid* as the heart of *Syari`ah* should be reinterpreted and at the same time placed back in its urgent position.

Generally, Islamic teachings are divided into three categories. First, the doctrine of *tawhid* (*al-ahkam al-i'tiqadiyah*), the teachings related to matters that must be confessed and believed such as faith in God, the Holy Books, God's angels, all God's prophets, the day of resurrection, and in the predeterminism (*Qadla-Qadr*). Second, the ethical-moral teachings (*al-ahkam al-khuluqiyah*), *i.e.,* the teachings associated with proper conducts with which people should behave and with despicable attributes that should be carved out of one's attitudes. In *tasawwuf,* this Islamic teaching involves *al-takhalli,al-tahalli,* and *al-tajalli*. *Al-takhalli* means emptying one's heart from despicable attributes such as *al-hasad* (malice, envy), *al-hiqd* (resentment), *al-kibr* (proud), *al-takabbur* (vanity), and *al-kidzb* (lying). Later on, in the stage of *al-tahalli,* this clean heart would be adorned with

commendable natures such as *zuhud* (asceticism), *sabar* (patience), *syukur* (*gratitude*), *wara'* (piety), *tawadlu* (humbleness), *qana'ah* (moderacy). Then, in *al-tajalli*, a perfect human being who has acquired God's attributes emerges. Third, the practical laws (*al-ahkam al-amaliyah*), the teachings related to human behaviour (*af'al*), sayings (*aqwal*), transactions (*uqud*) and legal acts (*tasharruf*) are enforced on someone religiously and legally considered competent (*mukallaf*).[28]

These dimensions of Islamic teachings are integrated into a single and unified entity. *Al-ahkam al-i'tiqadiyah* is the foundation and the theological basis of Islamic teachings, *al-ahkam al-khuluqiyah* as the moral foundation of human conducts, and *al-ahkam al-amaliyah* works at the practical level. Working in harmony, *al-ahkam al-amaliyah* should be based on the two previous dimensions. Performing prayers, giving alms, making pilgrimage to Mecca and other practical (*amaliyah*) teachings must be based on moral values of ethics and on faith in God the Almighty. *Amaliyah* teachings of any kind which are not based on moral values of ethics and faith are useless. In the context of *hudūd* and *qishas,* for example, an implementation of Islamic law is meaningless if separated from its ethical and moral values as well as its theological basis. This three-dimension unity of Islam is called the law of God, *Syari`ah*, or *fiqh*. Thus, the terms Islam, God's law, *Syari`ah* and *fiqh* are united Islamic teachings revealed by God to the Prophet Muhammad in the form of *aqidah*, *akhlaq*, and *amaliyah*. Hanafiyah School of law calls these united Islamic teachings *al-Fiqh al-Akbar*.[29]

Of the three dimensions of Islamic teachings, *al-ahkam al-i'tiqadiyah,* commonly referred as *tawhid* (monotheism), is believed to be the core, the heart and soul of religiosity, that is, the entire teachings of Islam is built upon the foundation of monotheism. *Tawhid* for Muslims is a worldview or paradigm that consitutes a starting point, foundation and goal of all religious quests. Therefore, monotheism has always been the vision and mission of all the Prophets and Messengers who have been sent to their community. The

28 Abdul Wahhab Khallaf, *Ilmu Ushul al-Fiqh* (Misr: Dar al-Ilm, 1978), pp. 32-33.

29 Wahbah al-Zuhaili, *Ushul al-Fiqh,* v.1, p.29.

tawhid vision of these Prophets was intertwined with a vision of humanity, so that the doctrine of monotheism which they brought was in struggle against inhumanity such as tyranny, injustice, oppression, slavery, despotism, economic inequality, discrimination against women, all defamations against humanity and all sources of destruction on earth. All the prophetic and apostolic missions always start from the basic teaching of monotheism.

God's prophets began with the command to declare the oneness of Allâh, which immediately connected with the command to do concrete struggle against anti-humanity, and realize humanity in any way possible everywhere on earth. For instance, the command of Allâh to the Prophet Shoaib in the Quran, al-A'raf /6:85:

وَإِلَى مَدْيَنَ أَخَاهُمْ شُعَيْبًا قَالَ يَا قَوْمِ اعْبُدُوا اللَّهَ مَا لَكُمْ
مِنْ إِلَهٍ غَيْرُهُ قَدْ جَاءَتْكُمْ بَيِّنَةٌ مِنْ رَبِّكُمْ فَأَوْفُوا الْكَيْلَ
وَالْمِيزَانَ وَلَا تَبْخَسُوا النَّاسَ أَشْيَاءَهُمْ وَلَا تُفْسِدُوا فِي
الْأَرْضِ بَعْدَ إِصْلَاحِهَا ذَلِكُمْ خَيْرٌ لَكُمْ إِنْ كُنْتُمْ مُؤْمِنِين

And (remember) when I sent their brother, the Prophet Shoaib, to residents of Madyan. Shoaib said, "O my people! Worship Allâh. There is no other god but Him. It has come to you a clear evidence of your God, then fulfill the measure and weight, do not cheat the wealth of others, and do not do mischief on the earth after being repaired. If you believe, this instruction will be better for you (to follow)". (QS. al-A'raf, 6:85)

This passage shows that God first asserts that monotheism was the basis for the Prophet Shoaib's struggle to save his people from social problems they faced, namely, economic arbitrariness committed by his people, marked by rampant fraud measures and weights, as well as from the indulgence of his people to destroy the environment in which they lived. The same notion was also asserted by God to other prophets, including Noah (the Qur'an, al-A'raf/6:59, al-Mukminun/23: 23; 71: 1-4), Hud (al-Araf, 6: 65), Salih (al-

Araf /6: 73, Hud/11:61), Hud (Hud/11: 50), Ibrahim (al-Ankabut/29:16). Similar mission was also instructed to the Prophet Muhammad. *Tawhid* message appears here and there in the Qur'an through the declaration فاعلمأنه لا إله إلا الله or لا إله إلا هو or لا إله إلا أنا, that there is no god but Him, there is no God except Allâh, and there is no God except Me. The most popular among Muslims, however, is an expression of monotheism لا إله إلا الله (*laa ilaha illa Allâh*).

In the history of divine religions, the spirit of monotheism has always been present in the midst of decadent public morality, corrupted civilization and tyrannical culture, where injustice, oppression, slavery, despotic authorities, economic inequality, and discrimination against women are rampant. The end of everything is defamation and negation against humanity. Prophet Muhammad was present as a messenger in the context of society that had blurred its own portrait with the mission of monotheism and brought them back to the nature of humanity together with its sacred divinity in place. The Prophet Muhammad was present not to bring a new religion, but to revive human divinity commitments that have tied them and their God from all eternity, the primordial commitment to deify Allâh, as in Sura al-Araf/6:172: *Alastubirabbikum? Qaaluubalaa* (Am I not your Lord? They answer: Yes, You are).

The monotheistic phrase *la ilaha illa Allâh* (there is no god but Allâh) contains two aspects: negation (*al-nafy*) and discernment (*al-istbat*). *Laa Ilaha* (no god) means the negation of everything deified, worshiped, glorified and worshiped. In a society whose ideology is polytheism (*shirk*), people deify and glorify stones, idols, wealth, ancestry, ethnic superiority, race, class, and language supremacy. In Arab society, people glorify male dominance over female.

What to be negated not only individual creed, polytheism, idolatry, but also socio-economic, political, and cultural glorification because *laa ilaha* also means the negation of all forms of slavery of human by human. Enslavement of human by human can be caused by the absolute power of the oppressive, excessive control of economy by a handful of people, cultural and structural poverty, the claims of the absolute truth and unequal social

relations. Absolute power, unjust wealth distribution, and claims of truth make socially oppressed people deprived of freedom and humanity. In fact, freedom (*al-hurriyah*) and humanity (*al-insaniyah*) is an important element of a person to be human. With *laa ilaha*, all idols and all inhuman systems are crushed. The petrified hearts of human beings would melt and people who already suffered would be liberated.

Wahbah al-Zuhaili said:

الحرية ملازمة للكرامة الإنسانية، فهي حق طبيعي لكل إنسان، وهي أغلى وأثمن شيء يقدسه ويحرص عليه،قال عمر بن الخطاب لواليه عمرو بن العاص: «متى تعبَّدتم الناس وقد ولدتهم أمهاتهم أحراراً» وعلى الحاكم توفير الحريات بمختلف مظاهرها الدينية والفكرية والسياسية والمدنية في حدود النظام والشريعة. وأعلن القرآن حرية العقيدة حرية الاعتقاد أو الحرية الدينيةوحرية الفكر وحرية القول.

Freedom cannot be separated from the glory of humanity. Freedom is a natural right for every human being. Freedom is the most valuable and the most precious thing that God sanctified and championed. Caliph 'Umar bin Khattab said to the governor of Egypt when this governor's son slapped a poor farmer: "Since when have you enslaved humanity, while he was born by his mother a free man?" The state must guarantee the fulfillment of freedom in various aspects of religion, thought, politics and civilization within the confines of the law and Syari`ah. The Quran has proclaimed freedom of faith, freedom of conscience, religious freedom, freedom of thought and freedom to voice opinions.[30]

As narrated in his *al-Umm,* one day when Imam Shafi'i finished his

30 Wahbah, *Al-Fiqh al-Islami,* vol. 8, p. 330.

teaching, he was approached by one of the students, who asked him for advice:

أوصني فقال الشافعي: يا بني خلقك الله حرا فكن كما خلقك

"Give me advice," said one of his students. Imam Shafi'i replied: "O my son, God has created you free, then be free as the way God created you.[31]

All this indicates Islamic guidance of equality of human before God and before their fellow human beings. Everyone has freedom of belief, thought and opinions. It is not allowed to curb others, even more to punish someone on the basis of differences in belief and thinking, and also to curtail freedom of expression. Being restrictive, judgmental, exerting faith and truth, let alone punishing on the basis of these, lead the way to the enslavement and destruction of humanity. The glory of humanity, thus, should not be deprived on any basis whatsoever and by anyone. Islam protects the nobility of human with laws that shelter and thwart efforts to humiliate it. Respecting all humans was reflected in *qishas* and *hudūd* when these are properly understood. The second phrase of *tawhid* is *illa Allâh* (but God). It is an affirmation and confirmation that the only powerful, the owner of the truth, the owner of glory, even the owner of the universe is God. To claim that truth and glory belong only to a person or a group of elect persons is unduly acts of taking God's rights. This second phrase of *tawhid* shows that the concept of *tawhid* prevents something from emerging and doing harm to people. *Tawhid* means not only to free men from bondage, but also to call to do justice to all human beings, to protect the oppressed, to eliminate all forms of injustice, and to make brotherhood among people. Human brotherhood (*al-ukhuwwah al-insaniyyah*) is one of the most tangible manifestations of monotheism. Did humans come from the same source, take the same primordial pledge, and

31 Abu Abdillah Muhammad bin Idris al-Syafi'i, *al-Umm* (Beirut:Dar al-Ma'rifah, 1990), vol. 1, p. 14.

return back in the end to the place where they previously came from? If so, why do people have to kill, degrade, and hostile to each other? Do killing, degrading and being hostile to other people mean killing, degrading and being hostile to ourselves?

With *la ilaha illa Allâh,* Muslims have no excuse to set fire on worshipers praying at a mosque other than yours, to assassinate a president accused of being *thaghut*, to be anti-democratic, anti-pluralism, anti-religious tolerance, anti-peace, anti-freedom of speech, thought and belief, anti-science, anti-civilization, to preserve the outdated teachings of the past, to kill each other in the name of religion, to knock down and burn places of worship where God is called inside, to campaign inequality between men and women, to lay off women, to veil and confine women to merely domestic spheres. *La ilaha illa Allah* is a tribute to humanity. Even long before the birth of human rights, Islam had recognized the humanity of human (*insaniyat a-l insan qabla huquq al-insan*). Humanitarian relations, both individual and social dimensions, either in the areas of worship, *mu'amalah*, social, political, economic and cultural, should be based on humanitarian values derived from the spirit of monotheism *La ilahailla Allâh*.

Hamzah Fansuri, a mystic and seeker of the true God born in Aceh, in his beautiful poem *Perahu* (Boat) illustrated the meaning of *La ilaha illa Allah* as follows:[32]

La ilahaillAllâh itu kesudahan kata
Tauhid *ma'rifat* semata-mata
Hapuskan hendak sekalian perkara
Hamba dan tuhan tiada berbeda
La ilahaillAllâh itu tempat mengintai
Medan yang *qadim* tempat berdamai
Wujud Allâh terlalu bitai
Siang dan malam jangan bercerai

32 Budhi Munawar Rahman, *Islam Pluralis: Wacana Kesetaraan Kaum Beriman* (Jakarta: Paramadina, 2001), p. 10.

Translation:
La ilahailla was the end of the word
Tauhid solely *ma'rifat* (high, perennial knowledge)
End all cases later on
Servant and Lord are not different
La ilahaillah is a place to lurk
Terrain *qadim* (ancient) a place to reconcile
Existence of God too *bitai* (far)
Day and night, do not depart

Th is Hamzah Fanzuri's poem reveals the depth of monotheism as reflected in the phrase *La ilahailla,* which emphasizes to eliminate human *will* or personal interests for power to conquer, dominate, control people, and hurt anyone standing in the way. *Tawhid* is essentially a concept of how to eliminate lust or human will, then replace it with God's will (*iradah Allâh*). The God's will is nothing other than manifestation of humanity itself, justice, peace, compassion, love, prosperity and happiness now and Hereafter. This is seen in the above Fansuri's words "*hamba dan Tuhan tiada berbeda*" (Servant and Lord are not different) and Ibn Arabi's statement "*fal-insanu 'abdun wa rabbun ma'an*" (humans are servants on one side and God on the other side). *Tawhid* is indeed a tribute to the values of divinity, which in the same time are the values of humanity.

B. Struggle for Human Values

Tawhid as the heart of Islam and other divine religions intertwines with human values. Faith in Allâh is parallel with the struggle to treat people humanely. The history of the prophets was filled with struggle to defend human values against the will of rulers, the owners of capital, and indigenous community leaders who have benefited from their social-political position *vis-a-vis* the weak majority. The Qur'an describes that human often get lost due to inhuman behaviour or because the structures and systems do not treat them as human beings. This human selfhood need to continue to be knitted in order not to easily rip away. Here are some verses on human selfhood:

And (remember) when your Lord said to the angels: "I am going to create a man (Adam) from sounding clay of altered black smooth mud. So, when I have fashioned him completely and breathed into him (Adam) the soul which I created for him, then fall (you) down prostrating yourselves unto him." (The Qur'an, al-Hijr/15: 28-29)

Who made everything He has created good, and He began the creation of human from clay. Then He made his [sic!] offspring from semen of worthless water (male and female sexual discharge). Then He fashioned him [sic!] in due proportion, and breathed into him [sic!] the soul (created by Allâh for that person), and He gave you hearing (ears), sight (eyes) and hearts. Little is the thanks you give! (The Qur'an, al-Sajadah/32: 7-9)

(Remember) when your Lord said to the angels: "Truly, I am going to create human from clay". So when I have fashioned him [sic!] and breathed into him (his) [sic!] soul created by Me, then you fall down prostrate to him [sic!]." "(The Qur'an, Shad/ 38: 71-72).

In building human values as manifestations of monotheism in real life, there are three aspects worth noting, namely the attempt to knit the values of humanity, the fading of the values of humanity, and how to rebuild the values of humanity with love.

1. Knitting Human Values

The Qur'anic verses above show that the process of creation of human was stratified according to the wisdom of God. *First*, He created human from clay. *Second*, God created the offspring of a drop of *worthless water*, the male sperm, and the female ovum. *Third*, God perfected the form of the body. *Fourth*, He breathed (part) the spirit into the human soul. *Fifth*, God equipped human with the potential to hear, see, and understand. On the creation and development of the first to the third level, the physical human being is no different from animal. People eat, drink, and meet the desires of biological mechanism as well as animals. But in the fourth and fifth stages of creation, humans have different and higher level than the others because in these stages God has breathed "part of His soul" into the human and furnished it with hearing, sight, and heart.

The three verses of the Qur'an above also confirm that the human spirit comes from the spirit of God. In the case of the spirit, it is only God who knows its secret, and only a tiny portion of the knowledge available to humans to grab. The word spirit can mean God's mercy (*rauhillah*, Qur'anic verse Yusuf, 12:87), happiness (*rauhun*, Qur'anic verse Al-Waqi'ah, 56:89), the Holy Spirit (*Ruh al-Qudus*, Qur'anic verse Al-Baqarah, 2: 253), and can also mean the life, the soul or spirit (Qur'anic verse al-Hijr, 15: 28-29). In simple terms it can be said that the soul is a source of strength, joy, serenity, peace, tranquillity, vigour, vitality, comfort and freshness, which of course comes from God. All humans, any gender, any religion, any ethnicity, any belief, any nationality without exception have God's holy spirit in them. In a Hadith it is affirmed that every human being was born on *fitrah* (nature), but then both parents and social environment led human beings out of their nature.[33] All humans are pure, clean, and on their nature, because in them lies holy *ruh Allâh*. With this spirit of God, human is called a human. That is human real existence.

Built-in spirit in every human being makes him or her referred to as "spiritual being," who is able to capture the values of divinity. The values of divinity in essence are nothing but the values of humanity. Humans are able to capture the divine messages because of their spirit and their capacity to spread them in the real life as social beings. The uniformity of the spirit in every individual shows that all human beings are equal (*al-Musawah*), sacred (*al-fitrah*), glorious (*al-karamah*), free (*al-hurriyah*), balanced (*at-tawazun wa al-'adalah*). They are brothers because they come from the same soul (*al-ukhuwwah al-basyariyah*), and therefore human should love each other, respect each other, and help each other in all spheres of life. It is very unnatural if people hate each other and kill each other or humiliate, degrade, and enslave other people because they in fact come from the same soul, the spirit of God. These are the noble values of humanity (*al-qiyam al-insaniyah*), vitality and the meaning of life that must be upheld. It also works as the purpose of life for all of humankind.

33 Al-Bukhari, *Shahih Bukhari,* vol. 2, p. 100, Muhammad bin Isa at-Tirmidzi, *Sunan at-Tirmidzi* (Mesir: Musthafa al-Bab al-Halabi, n.d.), vol. 4, p. 447.

Nevertheless, even though Humans have spiritual dimension, by which enables them to recognize, understand the values of divinity, the physical dimension (*hayawaniyah-jasadiyah*) always indulge human beings to lust excessively, rage indefinitely, hate, oppress, eager to power and control others as a part of humanity. Humans are not required to eliminate the *hayawaniyah* lust; rather they need to seek the balance between the dimensions *hayawaniyah-zhahiriyah* and *ilahiyyah-batiniyyah.* These two dimensions act to render human life into a dynamic, creative and innovative one in order to carry out the duties necessary for the prosperity of the earth as caliph. In the Q.S. Shams/91: 7-10, it is stated that both the potential and the human dimension was intentionally created by God in every human being, Allâh says:

وَنَفْسٍ وَمَا سَوَّاهَا فَأَلْهَمَهَا فُجُورَهَا وَتَقْوَاهَا قَدْ أَفْلَحَ مَنْ زَكَّاهَا وَقَدْ خَابَ مَنْ دَسَّاهَا

And by Nafs (Adam or a person or a soul, etc.), and Him Who perfected him in proportion; Then He showed him what is wrong for him and what is right for him; Indeed he succeeds who purifies his ownself (i.e. obeys and performs all that Allâh ordered, by following the true Faith of Islamic Monotheism and by doing righteous good deeds); And indeed he fails who corrupts his ownself (i.e. disobeys what Allâh has ordered by rejecting the true Faith of Islamic Monotheism or by following polytheism, etc. or by doing every kind of evil wicked deeds).

Littering one's soul means that dimension of *fujur* (evil) is more dominant than the dimensions of piety. Angry is actually not a bad trait. It becomes bad if not balanced with the nature of affection. The nature of revenge actually is not a bad trait for God also has revenge as a trait in Him. It becomes bad if it is not balanced with the nature of forgiveness. Viewing anger, resentment, stingy, envy, jealousy and so on as bad traits are not appropriate. The traits are bad only if they are not balanced with the opposite ones. God often reminds that to create a balance between the

two traits is important, so that we do not fall into *zhulm* (tyranny). For example, at each end of the verses of the Qur'an, Allâh pins the two traits at once in Himself; *azizun-hakim, ghafurun-rahim, sami'un-bashir, alimun-hakim*. A mighty strong human (*azizun*) can be tyrannical if it is not being balanced with wisdom (*hakim*), so too forgiving (*ghafurun*) can make others spoiled and blasé if it is not balanced with compassion (*rahim*). People who only heard the news (*sami'un*) would be in a very dangerous state if it is not aided by the ability to verify the information (*bashir*). Similarly, people who only have knowledge would be very dangerous if it is not being balanced with wisdom, because not all of the information to be known to others. Sometimes some knowledge just makes people sick, desperate, or regretful. It becomes beneficial only if it is accompanied by wisdom.

Tasawwuf or science of morality is essentially modelled upon how God attributes Himself (*at-takhallaqu bi ahlaqillahi*) which among others can be known from His traits as stated in the Qur'an. For example, when God deals with people who are in a state of emergency, urgency and need, God uses the nature *ghafurun-rahim* (forgiving and merciful). *But if one is forced by necessity without wilful disobedience nor transgressing due limits, then there is no sin on him. Truly, Allâh is Oft-Forgiving, Most Merciful* (Qur'anic verse al-Baqarah, 2: 173). Compare that with another event when God deals with people who potentially abuse the power given to him, God pin the nature of *aziz-hakim* (the Mighty, the Wise) for Himself. Why not *ghafur-rahim* (the Forgiving, the Merciful)? Because if in the context of the power, God shows mercy and loving nature, then that power tends to corrupt and abuse on the grounds that Allâh is Oft-Forgiving and Merciful. Thus, to balance and put right the nature of *fujur wa taqwa* is a manifestation of humanity itself.

Indeed, if humans are able to conquer the nature of *hayawaniyah*, then what is left in them is the nature of *uluhiyyah*. At that moment, humans lose the nature of their humanity, and the divinity takes its place. However, it will be an impossible task for humans. It is the will of God and He wants humans to remain in the nature of their humanity. Humans should not fall into bestiality, and conversely should not rise up into divine nature as well. With traits of humanity human is capable to performing the function assigned to caliphate,

i.e. working for the sake the prosperity of the earth, in order that justice, God's mercy, affection, and benefit to spread for all humankind.

At the time one commits an offense, makes a mistake, or does *zhulm,* in fact he or she is dropped of his/her nature of humanity. Therefore the punishment for a person with crimes and violations should not be eliminating his/her humanity, killing him/her, but should be restoring his or her humanity.

2. Fading Values of Humanity

In this age of sci e nce and technology, a remarkable progress and development in all spheres of human life are occuring. Sophisticated, even super-sophisticated, products of technology have comforted human beings in meeting all they want and need. People even indulge in it. Jobs run by muscles in the pas t centuries disappeared as they have been replaced by machinery and othe r human-made technologies. The result is that social relations, which are built on community togetherness and solidarity, slowly but surely erode. H umans gradually feel alienated from themselves and society. This human individualistic attitude gives birth to the social problems that stem from the distrust of our fellow human beings. It adds to suspicion and competition over interests, and furthermore intensifies social inequality, economic, and political prejudices among humans.

In Indonesia, the inequality is evident, especially in social, economic, and political areas. This imbalance has created social barriers and raises the split which already potentially existed in ethnicity, race, class, creed and religion. Potential friction was compounded by the emergence of class fanaticism, as well as in race, creed and religious views, coupled with religious truth claims that adorn the media, television screen, speech forums and pulpits. Human values are fading along with the birth of social and economic inequality. It is characterized by the emergence of a spirit to power, to amass unlimited wealth as if one may live forever.

In Sufism, the above phenomenon is a social disease; it originates from illness resting in one's heart. A person may seem physically healthy, but God knows he or she may suffers from pains in soul; he or she may suffer inside.

Sufism mentioned several diseases pertaining heart which affect one to be socially ill, *al-Hirsh* (greed), *at-takabbur* (vanity), *al-hasad* (envy), *al-hiqd* (resentment), *ar-riya'* (showing off), *as-sum'ah* (pretentious), and others. In addition, there are also diseases of heart, trivial ones, often not considered diseases, but they are, such as willingness to be respected but disrespect others, willingnessto receive gifts from others but reluctant to give back in return, willingnessto lead others all the time but never prepared to be led, a love to criticize others but never ready to be criticized, feeling proud when people thank them but never be happy to thank others, love to be praised but never praise others, and so on. All of these attitudes are symptoms that one's heart is ill. When someone's heart is ill, he or she could be dangerous to others, because he or she would provoke an adverse social misfortune to humanity.

Today's world is filled with many people with those heart's diseases. Hospitals aimed in the first place to make people healthier, but it turned out to be taken care of by people who are ill themselves. Education aims to create a brighter generation, who are healthy, intelligent, dignified, good mannered and competent, but it turns out to be led by people who are themselves not healthy and dignified. Law Institutions that are used to become the place where people can find justice, goodness and truth, are also led by people who often sell out error, injustice, while denying people's conscience. These are social diseases every committed Muslim need to heal.

3. Reviving the Values of Humanity with Love

The Prophet Muhammad was successful in fulfilling his prophetic mission in a short period of time, about 23 years. Within this short span of time, he raised the humanity long buried in the valley of immorality, enslavement, and social inequality, to a much better position. It was initiated by one paramount cause, that is, that he led with love. Love is capable to change hearts, arid becomes cool, wild temperament become tame, even death into life. Jalaluddin al-Rumi, a poet and great sufi, illustrates the power of love as follows:

Because of love, thorns become roses
Because of love, vinegar incarnates into fresh wine
Because of love, a blow becomes a crown to offer
Because of love, misfortune incarnates to luck
Because of love, jail becomes tavern full of roses
Because of love, a pile of dust like a garden
Because of love, blazing fire becomes soothing light
Because of love, an ogre turns into a fairy
Because of love, a hard rock becomes soft as cheese
Because of love, grief becomes joyous
Because of love, ghosts turn into angels
Because of love, lions are not as scary as rats
Because of love, pain becomes so healing
Because of love, anger turns into hospitality. [34]

The Prophet Muhammad was a great example of a leader who loved his people, even though they were notoriously wild, mischievous, and practicing idolatry. He does not want his people in misery and hardship, socially, economically, or religiously. He also did not want his people humiliated before the dignity of humanity. Therefore, he struggled against slavery and pursued to eliminate it from the face of the earth. Prophet also did not want shame and *nakedness* of his people open to public. Therefore, he worked hard to do all possible in his reach so that all dismercys of his people be covered by their own repentance or prayer of forgiveness. His love as a leader is not only uttered in words, but also with real action. He was obeyed not because of his power and influence, nor because of the ability to determine the fate of his people, but because his love is evident in all aspects he led. This is narrated in a Hadith as follows:

One day, after returning from the battle of Tabuk, the Prophet met Sa'ad bin Mu'adh al-Ansari. At that time, he saw the hand of Sa'ad blackened

34 Budhi Munawar, *Islam Pluralis*, p. 223.

and blistered. "What happened to your hands?" asked the Prophet. Sa'ad replied, "Because of the hammer and shovel I use to slice and drill down stone for my family to feed. That is my duty." Upon hearing the answer, the Prophet immediately took Sa'ad's hands and kissed them, saying, "These are the hands that will never be touched by the fire of the Hell.[35]"

The Prophet was a great figure, a leader much respected by his fellow people. Nevertheless, he did not hesitate to kiss the blackened, blistered, and rough hands of one working as a stone crusher. He gave an example of how to lead the people with love, instead of arrogance, anger, hate and revenge. Such leadership is also demonstrated in all of his law verdict and decisions including, and not solely, *Hudūd* and *qishas*. The Prophet was more than happy to forgive than to punish, as he was more pleased if his people asked to repent to God rather than reveal the guilt in front of the others.

In some books of Hadith compilation, a story about the magnanimity of the Prophet was narrated as follows:

One day, Ma'iz bin Malik came to the Prophet and claimed that he had committed adultery. Hearing this confession, the Prophet tried to avoid Ma'iz. He turned his face away to the four wind directions one by one to avoid the gaze of Mu'iz in order that he did not confess and withdrew its recognition. However, Ma'iz insisted on confessing to adultery. After clarification, he commanded all Sahabah (companions of the Prophet) to pelt him. After some moment since the stoning began, Ma'iz did not seem to be able to bear more pain. Finally, he fled. When escaping, he met another sahabah who brought a piece of stick and struck him

35 Jamaluddin Abdurrahman al-Jauzi, *al-Maudlu'at* (Madinah: Maktabah Salafiyyah, t.th.), vol.2, p. 251, Jalaluddin as-Suyuti, *al-Laly'i al-Mashnu'ah fi al-Ahadis al-Maudlu'ah* (Beirut: Dar al-Kutub al-Ilmiyyah), vol. 2, p. 130. According to al-Albani, this hadis is not very weak in transmission *(dla'if jiddan)* and not fabricated *(maudlu')* hadith, only weak *(dla'if)*. Views by scholars disrespecting this hadis and categorizing it as fabricated *(maudlu')* based on the information that Sa'ad bin Mu'ad al-Anshari died before war on Tabuk. So it is unlikely that the Prophet kissed his hands after Tabuk. This informatian is, however, denied by al-Hafidz Ibnu Hajar saying that Sa'ad that was mentioned in the hadist is not that Sa'ad proclaimed dead before Tabuk. Citing Ibnu Hajar, Syaikh Abdul Hayyi al-Kattani saying that in this hadis lies a remarkable story, that is, a kiss by the Prophet to the one working hard by his own hands to sustain the lives of his family. See *as-Silsilah adl-Dla'ifah*, vol. 1, p. 468.

drop dead. The news reached the Prophet. He rebuked, "Fahala taraktumuhu, ila 'Allâh yatubullaha wa yatubu Allâh" (why don't you let him run, then he repents to Allâh and then Allâh accepts his repentance).[36]"

The Prophet continued to show his love to his people even when they were found guilty. He wanted Ma'iz to get chance for repentance. This Hadith also signals that repentance to adultery can thwart *Hudūd* to be executed, though the court has decided, even after half-run penalty. Leaders with this spirit of love are the ones we all currently need, not the ones filled with hatred and vengeance, whose spirit to master and punish, nor leaders who save for themselves happiness and prosperity, while their people stay miserable.

When the Prophet was asked about how the best leader can be found, the Prophet answered as follows:

خِيَارُ أَئِمَّتِكُمُ الَّذِينَ تُحِبُّونَهُمْ وَيُحِبُّونَكُمْ وَتُصَلُّونَ عَلَيْهِمْ وَيُصَلُّونَ عَلَيْكُمْ وَشِرَارُ أَئِمَّتِكُمُ الَّذِينَ تُبْغِضُونَهُمْ وَيُبْغِضُونَكُمْ وَتَلْعَنُونَهُمْ وَيَلْعَنُونَكُمْ ». قَالَ قُلْنَا : يَا رَسُولَ اللَّهِ أَفَلاَ نُنَابِذُهُمْ عِنْدَ ذَلِكَ؟ قَالَ :« لاَ مَا أَقَامُوا فِيكُمُ الصَّلاَةَ إِلاَّ مَنْ وَلِيَ عَلَيْهِ وَالٍ فَرَآهُ يَأْتِى شَيْئًا مِنْ مَعْصِيَةِ اللَّهِ فَلْيَكْرَهْ مَا يَأْتِى مِنْ مَعْصِيَةِ اللَّهِ وَلاَ تَنْتَزِعَنَّ يَدًا مِنْ طَاعَةٍ.

The best leaders are those whom you love and who love you, and you always pray for them and they always pray for you. As for the worst leaders are those who hate you and you hate them, they curse you and you curse them.[37]

36 Abu Bakar ibn Abi Syaibah, *Musnad Ibn Abi Syaibah* (Riyad: Dar al-Wathan, 1997), vol.2, p. 161

37 Muslim bin Hajjaj bin Muslimal-Qusyairi, *Shahih Muslim* (Beirut: Dar Ihya' Turats Al-'Arabi, t.th), vol.3, p. 1481.

This Hadith confirms that the main stock a good leader has in his pocket is love. The leaders needed today are not only the tough and trustworthy, but also the ones loved by their people and ready to pay back their love as well. Love does not mean letting people behave as they please as this could actually endanger their own life and the life of society as a whole. To love is to lead with compassion; gentle, humble, fair and prepared in heart to give everything to the benefit of the people, not only here and now but also there and later.

C. Justice as the Ultimate Goal of *Syari`ah*

Doing justice is a teaching of Islam. According to the Qur'an, justice is closer to *taqwa* (piety), the highest level in one's faith. Allâh not only orders human to do justice, but also to fight for its implementation, like Allâh commands people not only to pray but also to enforce it. People who uphold justice have a very high position in Islam; they are called the people with the straight road (*shirath mustaqim*). The Qur'an repeatedly declares that the doers of justice are the people whom He loves. In fact, the Qur'an insists that people who kill the callers for justice are equal in sin to those who disbelieve the verses of Allâh, and the same as the person who killed the prophets. The Qur'an, Ali Imran/3: 21-22 says:

إِنَّ الَّذِينَ يَكْفُرُونَ بِآيَاتِ اللَّهِ وَيَقْتُلُونَ النَّبِيِّينَ بِغَيْرِ حَقٍّ
وَيَقْتُلُونَ الَّذِينَ يَأْمُرُونَ بِالْقِسْطِ مِنَ النَّاسِ فَبَشِّرْهُمْ
بِعَذَابٍ أَلِيمٍ أُولَئِكَ الَّذِينَ حَبِطَتْ أَعْمَالُهُمْ فِي الدُّنْيَا
وَالْآخِرَةِ وَمَا لَهُمْ مِنْ نَاصِرِينَ

"*Verily! Those who disbelieve in the Ayât (proofs, evidences, verses, lessons, signs, revelations, etc.) of Allâh and kill the Prophets without right, and kill those men who order just dealings, announce to them a painful torment. They are those whose works will be lost in this world and in the Hereafter, and they will have no helpers.*"

The words *al-adl* and *al-qisth* which means justice are mentioned many times in the verses of the Qur'an. According to the science of Islamic jurisprudence (*Usul Fiqh*), the repeated mentioning of a concept shows that the concept contains convincing instruction (*qhat'iyy al-dalalah*), that is, universal teaching of absolute truth. The command to do justice thus should not be treated as mere recommendation (*al-irshad*) or suggestion (*al-Nadb*), but as mandatory in nature (*li al-wujub*). The command to do justice is not equivalent to the command to get married, eat-and-drink, or to wear certain costume on a certain occasion. All these last mentioned commands are only suggestions (*li an-Nadb*). The importance of command to do justice is also indicated by the statement expressed in every Friday sermon: "Allâh commands you to do justice, do good deed and give the relatives their rights, and (He also) prohibits the contrary (to those mentioned)."

Commands justice is not only at the individual level, but also the level of the family, and the general public. Justice and testimony should be upheld in spite of ourselves as God commands in QUR'ANIC VERSE. An-Nisa, 4: 135:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ بِالْقِسْطِ شُهَدَاءَ لِلَّهِ وَلَوْ عَلَى أَنْفُسِكُمْ أَوِ الْوَالِدَيْنِ وَالْأَقْرَبِينَ إِنْ يَكُنْ غَنِيًّا أَوْ فَقِيرًا فَاللَّهُ أَوْلَى بِهِمَا فَلَا تَتَّبِعُوا الْهَوَى أَنْ تَعْدِلُوا

"*O ye who believe! Be ye people who truly uphold justice, as witnesses to Allâh even though incriminate yourself or your parents or your kin. If he is rich or poor , then God knows better both. So do not follow your own desires and deviate from the truth*."

Justice should also be enforced in the family sphere where injustice may often occur without notice, to especially the children and women (Qur'anic verse An-Nahl, 16:90). In the context of the family, the Qur'an prefers monogamy than otherwise because polygamy has a high potential for injustice and tend to lead into ill-treatment (Qur'anic verse An-Nisa, 4: 3 and 129).

Justice should also be the center of the attention when the government adopts whatever policy, when peacemakers reconcile, when secretary puts numbers, when someone has a word, when traders weigh and measure, when Muslims build relationships with non-Muslims, when a person or institution takes care of orphans, when a witness testifies and when a judge makes law and punishment. Fair treatment in the entire regions of human activities might prevent unjust, arbitrary, and repressive acts, as well as violent and unnecessary coercions.

Justice will bring love, and love gets all efforts closer to embodiment of justice. The Qur'an forbids hatred, because it would create a barrier to justice, as defined in the Qur'anic VerseE. al-Maidah/5: 8 as follows:

يَا أَيُّهَا الَّذِينَ آمَنُوا كُونُوا قَوَّامِينَ لِلَّهِ شُهَدَاءَ بِالْقِسْطِ وَلَا يَجْرِمَنَّكُمْ شَنَآنُ قَوْمٍ عَلَى أَلَّا تَعْدِلُوا اعْدِلُوا هُوَ أَقْرَبُ لِلتَّقْوَى وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ خَبِيرٌ بِمَا تَعْمَلُونَ

O you who believe! Stand out firmly for Allâh and be just witnesses and let not the enmity and hatred of others make you avoid justice. Be just: that is nearer to piety, and fear Allâh. Verily, Allâh is Well-Acquainted with what you do.

This verse is related to the attitude of Jews whose opposition to the Prophet was harsh. Despite the heat which escalated, the Qur'an reminded Muslims not to treat others unfairly. Hatred against others, either because of personal, political, economic, cultural, and religious factors, often leads someone to act inappropriately. This verse is often recited in many occasions but its instruction is rarely implemented. Based on the verse, people who are able to consistently do justice, either in hatred or love, happy and grieved, to themselves or others, would likely be loved by Allâh.

Justice should be the center, root, or the bases of decisions and policies of law because justice is the purpose of the enactment of laws (*tasyri 'al-hukm*) and among the objectives of Syari`ah (*maqhashid ash-Syari`ah*). In

this context, Ibn al-Qayyim al-Jauziyah (691-751 AH / 1292 AD 1350) in his famous book *I'lam al-Muwaqqi'in* said:

فَإِنَّ الشَّرِيعَةَ مَبْنَاهَا وَأَسَاسُهَا عَلَى الْحِكَمِ وَمَصَالِحِ الْعِبَادِ فِي الْمَعَاشِ وَالْمَعَادِ

Indeed, the foothold and bases of Syari'ah are the wisdom and benefit of all the people in the world and in the hereafter. Syari'ah is justice itself, mercy, benefit, and wisdom. Therefore, any legal matters which change from just into unjust, from mercy into malediction, from benefitial (maslahat) into destructive (mafsadat), from wise into futile, are not part of Syari`ah, eventhough they are being forced to be regarded as part of Islamic Syari'ah through interpretation. Syari'ah is the justice of God for all His people, sign of His compassion for all His creatures, His protection He made on earth.[38]

The scholars agreed that Syari`ah is justice, mercy, welfare, and wise. The problem lies precisely in the interpretation of those phrases. Therefore, it is necessary to do consensus (*ijma' or ittifaq*), either domestically, nationally or internationally, to formulate what is meant by justice, mercy, benefit, wisdom, and in which context legal decision will be applied, in a certain time and space, in all levels, in person, family, or society, and how to do *ijtihad bi tahqiqi al-manath* as in the science of Islamic Jurisprudence (*Ushul Fiqh*) they term it. The so-called fair in space and time is not necessarily fair in a different space and time. Therefore, it is necessary to reinterpret constantly, both in micro and macro scope, the core concepts of Islamic teachings. For instance, justice in the case of polygamy: what does a husband think of it, also in the perspective of the wife, the children, the extended family, or the society, what do they all believe in common? Everyone must have their share in opinions. This should also be applicable to the meaning of justice in the context of *Hudūd*.

38 Ibnu Qayyim al-Jauziyyah, *I'lam al-Muwaqqi'in* (Kairo: Mathabi' al-Islam,1980), v.3, h. 3.

D. Dialectics between Texts and Contexts

Understanding the legal text in the Qur'an and Hadith cannot underestimate the context of texts within community. The texts of Syari`ah (*al-nushus al-syar'iyyah*) often can be understood correctly and thoroughly only if the historical context (space and time) are known and understood. Very often, erroneous understanding occurs when the historical context of the text is ignored.

For example, the Quran, al-Ma'idah/5:93 says:

لَيْسَ عَلَى الَّذِينَ آمَنُوا وَعَمِلُوا الصَّالِحَاتِ جُنَاحٌ فِيمَا طَعِمُوا إِذَا مَا اتَّقَوْا وَآمَنُوا وَعَمِلُوا الصَّالِحَاتِ ثُمَّ اتَّقَوْا وَآمَنُوا ثُمَّ اتَّقَوْا وَأَحْسَنُوا وَاللَّهُ يُحِبُّ الْمُحْسِنِينَ

"*Those who believe and do righteous good deeds, there is no sin on them for what they ate (in the past), if they fear Allâh (by keeping away from His forbidden things), and believe and do righteous good deeds, and again fear Allâh and believe, and once again fear Allâh and do good deeds with Ihsân (perfection). And Allâh loves the gooddoers..*" (QS. al-Ma'idah, 5:93)

If the verse is understood textually without understanding the context, the outward understanding is "if someone believed, fear Allâh and do good deeds, there is no blame whatsoever on what he eats and drinks, even though that is forbidden." This kind of understanding will be very dangerous if it is taken in the context of corruption, which means "there is no sin to do and enjoy the corruption if the perpetrator is faithful, devoted, doing good deeds and spreads kindness." This misconception is caused by the neglect of the context of the text when it was revealed. This verse can only be understood correctly when it is known that it came down with regard to the anxiety of the Prophets' companions after the prohibition of drinking wine (*khamr*). They were anxious because previously many companions, both living and deceased, drank alcoholic beverage. Anxiety was healed by Qur'anic verse al-Maidah verse 93 mentioned above. Therefore, the permission to consumpt

wine was merely applicable before the revelation of the verse which prohibits drinkingwine. After the verse revelation, there is no dispensation to drink wine for any body, including those who are faithful and the most God-fearing ones and the good doers.[39]

Aishah, the Prophet's wife who was well-known for her intelligence, often corrected erroneous understanding of the companions of the verses of the Qur'an, simply because sometimes the context of the verse was ignored. For example:

> *Muawiyah once wanted to appoint Yazid caliph after him. He later wrote a letter about his wish and sent it to Marwan, a governor in Medina at the time. Marwan then collected and encouraged people to pledge allegiance to Yazid after the death of Muawiyah. Abdurrahman Bin Abi Bakr refused allegiance to Yazid. Seeing this, Marwan almost did violence against Abdrurrahman because he referred to verse al-Ahqaf, 46:17 that a rebellious child mentioned in the verse is none other than that Abdurrahman. Aisha was luckily there, she explained that the rebellious child referred to is not Abdurrahman ibn Abi Bakr, but someone else.*[40]

A'ishah also often criticized the companions of the Prophet for narrating a Hadith while ignoring its context. For example, as narrated by Abu Hurairah, a Hadith says that women are the sources of bad luck, similar to houses and horses. Hearing these words, A'ishah said that Abu Hurairah only heard the end of the Hadith and did not hear the beginning. Actually, at that time, the Prophet was condemning the views of Jews who say that the sources of misfortune are women, home and horses. Abu Hurayrah was late entering the *majlis* (learning circle) of the Prophet and only heard the last words of the Prophet. In fact, the last sentence was not a statement of the Prophet, but the Jewish's view. Abu Hurairah lost initial context of it and cost him a mistake looking at the issue.[41]

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39 Jalaluddin as-Suyuti, *Ad-Durr al-Mantsur* (Beirut: Darul Fikri, nd.), vol. 3, p. 159, Abu al-Fida' Isma'il Ibnu Katsir, *Tafsir Ibnu Katsir*, (np.: Dar Thayyibah, nd.), vol. 3, p. 182.

40 Manna Khalil al-Qhatthan, *Mabahits fi Ulum Al-Qur'an*, (t.tp.: Mansyurat al-Ashri al-Hadis, nd.), p.80.

41 Abu al-Fadl Ibnu Hajar al-Asqalani, *Fath al-Bari* (Maktabah Syamilah), vol.6, p.61.

The three examples above show that the context of the text (*nushus*), in all its social, economic, cultural, and political backgrounds; that is, under what condition it was addressed, or to whom it was referred is very important to be understood. Al-Syatibi, a scholar from the Maliki school of *Usul Fiqh*, reminded the importance of understanding *asbab-nuzul* (reasons behind the revelation) in specific, also the traditions or customs of the Arabs in general when a verse of the Qur'an was revealed. Al-Syatibi said:

ومن ذلك معرفة عادات العرب في أقوالها وأفعالها ومجارى أحوالها حالة التنزيل وإن لم يكن ثم سبب خاص لا بد لمن أراد الخوض فى علم القرآن منه وإلا وقع في الشبه والإشكالات التي يتعذر الخروج منها إلا بهذه المعرفة.

of the Arab community in their speech, attitude, and cultural interactions when the verse was revealed, even when there is no special reason for it. People who want to dive into the science of the Qur›an must master this. If not, they may fall into the maze of texts, and may experience problems not easy to solve.[42]

Nowadays Muslims face the problem of the limited quantity of text (*tanahiyatu an-nushus*) and infinity of problems facing humanity (*ghairu tanahiyati al-waqi'*). That is, the guiding text is limited in quantity, not sufficient in coping with all obstacles, while humanity continues to face problems without an end. This fundamental problem will be resolved only by the scholars capable of understanding the characteristics of the verses of the Qur'an and the Hadiths of the Prophet.

The scholars divide the verses of the Qur'an into four characteristics. *First*, the specifics (*nash juz'iy*), namely, the verses of the Qur'an that regulate specific issues. For example, verses regulating prayer, fasting, charity,

42 Ibrahim bin Musa al-Syatibi, *al-Muwafaqat fi Ushul as-Syariah* (np.: Dar Ibnu 'Affan, 1997), vol. 3, p. 351.

pilgrimage, alcoholic beverages, adultery, theft, marriage, *riba* (usury), *awrat* (parts of the body which needs to be covered), *'iddah* (waiting period), divorce and others. *Second*, the universals (*nash kulliy*), the verses of the Qur'an which explain and confirm the values between good-bad, right-wrong, *halal-haram*, appropriate-inappropriate, morality, virtue, *akhlaq* (conducts), and other religious principles. *Third*, the texts referenced as secondary arguments, namely, the verses of the Qur'an which instruct Muslims to stand on the secondary sources when they could not find a clear answer in the Qur'an and the *Sunnah* (prophetic traditions), such as verses that order to stand on *maslahat* (benefits to community), which can later be extracted through methods called by *ijma'* (consensus), *Qiyas* (analogy), *Maslahah mursalah* (public benefit), *Istihsan* (juristic preference), and *'Urf (custom)*. *Fourth*, the texts that refer to the purposes of Syari`ah (*Maqahashid ash-Syari`ah*), that is, the verses that describe the objectives of law in general.

Understanding the characteristics of the verses of the Qur'an is very important to capture their intent not only *harfiyyah* (literally), but also contextually. It is also very useful to determine whether the formulation of the laws of the particular text (*nash juz'iy*) is aligned with the principles and objectives of law. Its lack of understanding can create the very literal-formalistic products that do not touch the substance of the law. Particular text (*nash juz'iy)* cannot be separated its understanding from universal text (*nash kulliy*) and the objectives of Syari`ah (*Maqhashid ash-Syari`ah*). Al-Syatibi in *al-Muwafaqat* said:

> *Whoever adheres to the particular text (nash juz'iy) and ignores the universal text (nash kulliy) is wrong. Similarly, whoever stands on nash kulliy and neglects nash juz'iy is wrong.*[43]

Reading religious texts, especially concerning the issues of law (*fiqh*), requires a mastery of science of Islamic jurisprudence called *Usul Fiqh*, here is a set of methods to do the reading of the dialectics between the religious

43 Al-Syatibi, *al-Muwafaqat*, vol.2, p.153.

text (*nushus syar'iyyah*) and the empirical reality of society elaborated. Therefore, a grand agenda *Usul Fiqh* has is the analysis of text on the one hand and *maqashid ash-Syari`ah* on the other hand. A text analysis is directed to understanding religious texts, in this regard the Qur'an and Hadith, correctly, while the *maqashid al-syari`ah* analysis is intended to interlink the meaning of the text with the empirical reality and the real necessities of the community where the text about to be implemented. The text analysis, together with the analysis of *maqashid ash-syari`ah,* must be done when someone is about to do *ijtihad* in solving the problems of humanity. *Ijtihad,* when based solely on the text will bear verdicts void of human values. On the other hand, *ijtihad* which only rests on *maqashid al-syari`ah* will result in unpredictable public chaos, or at least difficult to be accepted by the majority of people who put the holy texts in high regard.

To meet the requirements of text analysis, *Usul Fiqh* offers incredibly complex and appealing linguistic rules. For example, in *lafzh* (word) categories such as: *al-amm* (generality), *al-khas* (particularity), *al-mutlaq* (absolute), *al-muqayyad* (restricted), *al-amr* (command), *an-nahi* (proscription), *al-musytarak* (equivocal), *al-muawwal* (unorthodoxy), *al-haqiqah* (denotative), *al-majaz (metaphor), al-kinayah* (allegory), *al-zhahir* (literal), *an-nass al-mufassar* (interpreted text), *al-muhkam* (solid), *al-khafi* (hidden), *al-musykil* (abstruse), *al-mujmal* (global), and *al-mutasyabih* (ambiguous). In addition to these categories of words, there are also othersentences, such as *al-manthuq* (explicit) and *al-mafhum* (implicit) in Shafi'ite school of law, *ibarah an-nass* (expression of the text), *isyarah an-nass* (sign of the text), *dalalah an-Nass,* (indication of the text) and *iqtidha an-nass* (necessity of the text) in Hanafite school of law. Theories about the text can be used for splitting, digging and opening many hidden meanings of the text, as suggested by Ali bin Abi Talib, that the Qur'an contains many possible meanings (*al-Qur'anu hammalun dzul aujuh*). Its meanings are abundant like water of the ocean trapped in the crevices of the text which can only be read by someone competent and has rich variety of theories. *Usul Fiqh* is the science that provides those theories of the text analysis.

In addition to text analysis, analysis of *maqashid al-syari`ah* or analysis of substantive purposes of the rule of law is also important. Eminent scholars such as al-Ghazali (d. 504H), al-Thufi (d. 716H), and also al-Syatibhi (d. 780H) have provided interesting and in-depth exploration of this discourse. Although their concept of *Maslahat* still seems theocentric, but there is a speck of light that we can use as a lantern to build a more humane *Maslahat* and give a kind of assurance that Islam indeed aims for the welfare of all humankind. Thus, an urgency to understand the text by combining the text and context has actually been called by almost all scholars, both classical and contemporary. It's just that the spirit of excessive formalization of Islamic Syari`ah is not accompanied by the ability to use adequate methodology of interpretation. This tendency has led the literal understanding of religious texts becomes more popular. Therefore, bringing back Islam to the understanding and contextual *ijtihad* becomes an urgent agenda that should be executed so as not to get caught up in mere outer skin of Syari`ah.

Theoretically, *ijtihad* is divided into three categories, namely *Ijtihad Bayani* or *al-ijtihad min an-nushus, Ijtihad Qiyasi,* and *Ijtihad Ishlahi*. *Ijtihad Bayani* is directed on understanding the contextual text. This *Ijtihad* necessitates a *mujtahid* to master the four things, namely:

a. *Asbab an-Nuzul* or reason behind the text. It may come either because specific reason (*khash*), general (*am*), or emergent present situation (*asbab an-nuzul al-jadid*).
b. The rules of the language (*al-qawa'id al-lughawiyyah*).
c. The ability to associate a legal text with other legal texts (*rabthu an-nushush ba'dliha bi ba'dlin*). It is because many verses and Prophetic traditions cannot be understood except by linking them with other verses or Hadith which comes before or after those verses or hadith.
d. The ability to associate legal texts with the benefit of the people as the ideal of law (*rabthu an-nushush bi maqhashidi ash-Syari`ah*). Legal text and purpose of the law cannot be separated because both require one another because*maqhashid al-syari`ah* are essentially extracted from the particular text (*an-Nushus al-Juz'iyyah*).

Ijtihad Qiyasi and *Ijtihad al-Istislahi* are the types of *ijtihad* that use derivative arguments using methods such as *Ijma', Qiyas, Maslahat Mursalah, Istihsan,* and *'Urf*. These three methods are not only required to respond to new issues, but also 'classical' issues such as criminal cases in the context of the new social context, in order that the application of the law formulated in the classical period can be applied in the present time. That way that it does not become disoriented, and that the purposes of the whole building of Islamic law can work and be benefitial as hoped.

In *ushul fiqh,* the above three types of *ijtihad* are called *ijtihad bi takhriji al-manath*, that is, *ijtihad* which seeks to draw message, hidden meaning, or legal assumption out of the Qur'an and as-Sunnah texts. The task of a *mujtahid* is not only *ijtihad bi takhriji al-manath*, but also *ijtihad bi tahqiqi al-manath*, namely to communicate and interlink the message and meaning of the text to the reality. Therefore, it is not correct that *ijtihad* can only be done to the texts in the category of *zhanniy al-dalalah*(conjectural religious evidence). Instead, *ijtihad* must also be done to the texts of *qhat'iy al-dalalah* (definite religious evidence)because message of the text drawn either from *zhanniy al-dalalah* and *qhath'iy al-dalalah* still needs to be discussed against reality through *ijtihad bi tahqiqi al-manath*. This is indeed the essence of jurisprudence, the nature of Islamic law, namely *al-jadaliyat nushush bi al-waqa'i*, the dialectics between text and context.Chapter Two

The Philosophy Of Islamic Law

Like other laws, Islamic law has a philosophy as its foundation upon which it is regulated and enacted. As a foundation, the philosophy of Islamic law is central as it plays a very important role in making and applying *syari`ah*-based regulations and laws. Unfortunately, its important position is often neglected in making and enforcing Islamic *syari`ah*. The Qur'anic verses and the Prophet's tradition are often approached with a very formalistic and textual approach. As a result, the formulation and implementation of Islamic law is not felt in reality and do not take the objectives of Islamic law into account. This chapter will discuss how Islamic law can be made and implemented in line with its philosophy so that the objectives of Islamic law can be attained in this changing world.

A. Islamic Law between *Syari`ah* and *Fiqh*

In the discourse of law, some terms seem to be overlapping, which make them not only difficult to understand, but also lead to unintended errors. Those terms are *Islamic law, Islamic Syari`ah, the Syari`ah, fiqh, Islamic Fiqh,* and *the law of Allâh*. Among these terms, it seems that the term *Syari`ah* is the most popular so it gives birth to the terms of application of Syari`ah, a formalization of Syari`ah, and the like. The question arisen here is do these terms refer to the same notion?

Initially, the terms of Allâh's law, Islamic law, *Syari`ah* and *fiqh* refer to the same notion, *i.e.,* all legal provisions that were revealed from Allâh, either extracted from definite religious evidence (*qhath'iy al-dalalah*) as well as from conjectural religious evidence (*dhanniy al-dalalah*) regarding faith, morality, and everyday activities (*'amaliyah*). Thus, everything believed to have come from Allâh is called *Syari`ah, fiqh* or the law of Allâh. In this sense, the law

is *fiqh*; *fiqh* is *Syari`ah*; and *Syari`ah* and *fiqh* are Islamic laws. All three refer to the same meaning.

In the next development, in conjunction with the call to renew *Syari`ah* (*tajdid ash-Syari`ah*), following the new notion that changes are allowed to occur in Islamic law according to the necessities of time (*al-azman*), condition (*al-ahwal*), environment (*al-bi'ah*), and the social context (*az-zhuruf*), an anxiety has spread in the Muslim world. This anxiety was roughly formulated in the following questions: "As Allâh's law, *Syari`ah and fiqh* comes from Allâh, how can it be changed? But, if it doesn't change while its social context changes, the law will then be abandoned". The next questions arose: "Is it true that Allâh's law cannot be changed? If it can be changed, which law?" That's exactly the time when Muslim religious scholars began to distinguish Islamic law into two categories, *Syari`ah* and *fiqh*.

Syari`ah is a kind of Islamic law which is derived from definite Quranic verses or the Prophet's hadith (*qath'iyyu ad-dalalah*). *Fiqh* is a kind of Islamic law with its arguments gained through intellectual reasoning (*istinbath-ijtihad*) from the conjectural sources (*zhanniyyu ad-dalalah*).

Islamic law of Syari`ah category generally has the following characteristics:

a. In general, it is in the form of the universal principles of religion, such as faith, justice, honesty, kindness (*at-thayyibat, al-khair, al-ma'ruf*), immorality (*al-khaba'ist, al-bathil, al-fasid*), permitted-forbidden (*halal-haram*), equality (*al-Musawah*), freedom (*al-hurriyyah*), accountability (*al-mas'uliyah*), public benefit (*al-Maslahat*), and others.
b. Universal in nature (*al-usul-al-Kulliya*), in the sense that it doesn't change along with the changes of time and space.
c. Absolute in nature (*Qath'iyya*), meaning it is abstracted directly from definite texts (*qhath'iyyu ad-dalalah*), and therefore, undeniable.
d. No room for *ijtihad*, as it is believed to be part of the teachings described explicitly in the text of Syari`ah (*al-manshushah*). In this regard, scholars of *Usul Fiqh* outline the rule *la ijtihada muqabatali an-nass* (no *ijtihad* before the definite texts).

The Islamic law of *fiqh* category has several distinctive features as follows:

a. It is based on the Qur'an and the hadith, either directly or indirectly,

through the texts in the form of general principles (*al-Mabadi 'al-`ammah*), or its spirit (*ruh*).

b. It is comprehensive, in the sense that it comprises the whole set of human behaviors that includes human relationship with Allâh, with their fellow human beings, as well as their relationship with their society and the environment.
c. It is normative and moralistic, in the sense that all the provisions of *fiqh* aim to uphold the primacy of morality and noble character in order to create stability in human society.
d. Proportional, it protects individual and collective benefits intact and balanced. When contradiction occurs between the two, it chooses collective benefit to be at front.
e. It is elastic and flexible. *Fiqh,* as the product of *ijtihad*, tends to change and to be disputable.
f. It is both *dunyawiyah* (earthly) and *ukhrawiyah* (heavenly) in its nature, in the sense that obedience or violation in the implementation of *fiqh* law has both good and bad implications in the world and the hereafter.
g. It is contextual, relative, temporal, and local, in the sense that verity in *fiqh* is related to time, place, and all circumstances and conditions.

A point to be noted is that the Islamic law category of Syari`ah cannot change, cannot be replaced even if the circumstances, condition, and time continuously change. In this regard the principle of *al-hukmu yaduru ma'a illatihi wujudan wa 'adaman* (law exists or does not exist depending on reason or cause), also the rule *la yunkaru taghayyuru al-hukmi bi taghayyuri bi al-ahwal, al-amkan wa, wa al -azman, wa al-bi'ah* (any legal changes caused by change of conditions, place, time, and environment cannot be denied) is not applicable. Meanwhile, Islamic law of *fiqh* category is quite the opposite, because it is local (*mahalliyah*), temporal (*waqtiyah*), situational (*zamaniyah*) and alterable (*al-mutahawwilat wa al-mutaghayyirat*).

Syari`ah is often interchangeable with *fiqh* and vice versa. This can cause problems if we are not fully aware that *fiqh* is a dimension of Islamic law

derived from the results of study by scholars (*ijtihadiyah-zhanniyah*) that can be changed, while the Syari`ah is the dimension of Islamic law derived from firm and definite texts (*manshushah-qhath'iyyah*) that is universal, absolute, and applicable throughout the ages. Islamic law category of *fiqh* in general is part of "*al-mutaghayyirat*", and it potentially changes, while Islamic law of Syari`ah category is "*ats-tsawabit*", absolute, and cannot be changed. Nevertheless, as explained in previous discussions, although Syari`ah is *qhat'iyu ad-dalalah* (definite religious evidence) but at the level of the application (*tathbiqiya*) it remains *zhanni*(conjectural). That is, it is very likely that Islamic law category of Syari`ah to be irrelevant in a particular context, so that *ijtihad istislahi*, based on *maqashidu ash-Syari`ah,* can work as a solution to the legal vacuum.

The two terms, application of Syari`ah and formalization of Syari`ah, used today often do not mean the Syari`ah in the above sense, but rather in the sense of Syari`ah as *fiqh*. Therefore, the intended application of Syari`ah is essentially the application of *fiqh* or its formalization, which is actually dynamic, tentative, relative and local. For example, when Aceh applied *Qanun Syari`ah*, a question raised, "Which version of Syari`ah takes place? Does it a version by al-Shafi'i, Abu Hanifa, Malik, Ahmad Bin Hanbal or others? Or a mix of all?" Formalization of Syari`ah which is then understood as the standardization of *fiqh* has become problematic, since *ijtihad* space once was wide open in *fiqh* is now closed, because it is understood as Syari`ah which is absolute and universal. Application of Islamic Syari`ah law should take into consideration this dimension of the universal law, but also take into consideration the dimension of *fiqh* which is local and not immune to change due to differences in circumstances, conditions and environment in anywhere the application of the law occurs.

B. Objectives of the Application of Islamic Law

Muslim religious authorities agreed that all the provisions of Allâh in the Qur'an and Sunnah are intended to create prosperity for humankind in the world today and in the hereafter (*sa'adat al-darain*). Commands and prohibitions contained in both authoritative sources lead the humankind

towards the expected purposes of life, happiness in the world and the hereafter. Welfare, happiness, and goodness are at the peak of all the legal procedures. No single legal provision was arranged for purposes other than that. This ultimate goal is as meant by scholars as *maqhasidu ash-Syari`ah*, Syari`ah objectives.

The term *al-maqshid* (or *al-maqashid* in plural), etymologically means "purpose" (*al-Hadf*), "principle" (*al-gharadh*), "intention" (*al-mathlub*) and "final destination" (*al-ghayah*). The word *al-maqshid* in English means "the end" (الإند), or *telos* (التيلوس) in the Greek language, *finalite* (الفيناليتيه) in French, and *Zweck* (زفيك) in German.[44] Terminologically, the scholars provide a wide variety of definitions, but refer to the same substance. Here are some of the known definitions.

a. Allal al-Fasyi:

اَلْغَايَةُ مِنْهَا وَالْأَسْرَارُ الَّتِي وَضَعَهَا الشَّارِعُ عِنْدَ كُلِّ حُكْمٍ مِنْ أَحْكَامِهَا

"Maqashid ash-Syari`ah is the ultimate goals and the secrets put by Syari' (law giver) behind every legal provisions."[45]

b. Ibn Assyria:

مَقَاصِدُ التَّشْرِيْعِ الْعَامَّةُ هِيَ الْمَعَانِي وَالْحِكَمُ الْمَلْحُوْظَةُ لِلشَّارِعِ فِى جَمِيْعِ أَحْوَالِ التَّشْرِيْعِ أَوْ مُعْظَمُهَا بِحَيْثُ لَا تَخْتَصُّ مُلَاحَظَتُهَا بِالْكَوْنِ فِى نَوْعٍ خَاصٍّ مِنْ أَحْكَامِ الشَّرِيْعَةِ

44 Jasser Auda, *Maqasid al-Shari`a as Philoshophy of Islamic Law a Systems Appproach* (Washington: IIIT, 2008), p. 2.

45 Ahmad ar-Raisuni, *Nadhariyat al-Maqashid inda al-Imam al-Syatibi* (nd. : al-Ma'Had al-Alami li al-Fikr al-Islami, 1990), p. 18.

"Maqashid ash-Syari`ah are meanings and reasons a Syari' wants to give more concerns in all or most of law enactments."[46]

c. Some other scholars define:

هِيَ الْهَدْفُ أَوِ الْأَغْرَاضُ أَوِالْمَطْلُوْبُ أَوِ الْغَايَةُ مِنَ الْأَحْكَامِ الْإِسْلَامِيَّةِ

"Maqashid ash-Syari`ah are the purposes, principles, objectives, and ultimate goals of Islamic law."

From all these definitions, it can be concluded that *maqashid ash-Syari`ah* are purposes and reasons behind every law legislated by Allâh. The question of the secret, purpose and reason behind five-time prayer, pilgrimage, *zakat*, marriage, divorce, *hudud, qishas,* and so on, can deliver one to *maqashid ash-Syari`ah* behind the provisions of the law. Some scholars of *fiqh* hold that *maqashid ash-Syari`ah* or *Maqashidu ash-Syari* or *al-maqashid ash-Syari`ah* is synonymous with *al-Mashalih*. Abdul Malik al-Juwaini (d. 478H / 1185M) is one of the scholars who propose that the terms *al-maqasid* (objectives of Syari`ah) and *al-Mashalih al-ammah* (public good) which convey the same meaning.[47]

Al-Mashalih is the plural form of *al-Maslahah* which means *al-khair* (goodness) or *al-manfa'ah* (benefit). *Al-Maslahah* linguistically also means the opposite of *al-mafsadah* (damage). The word *maslahat* (Indonesian) is derived from the word *al-Maslahah* in Arabic that starts from the word base صَلَحَ – يَصْلُح. An unabridged dictionary of Indonesian language defines the word *maslahat* with something positive (welfare, etc.), *faidah*, and *guna* (benefit and usefulness). Thus, *maslahat* means benefit, usefulness, kindness, and necessity.

46 Muhammad Thahir Ibnu Asyur, *Maqashid asy-Syariah al-Islamiyah* (Tunisia: Dar as-Salam, 2006), p. 39.

47 Jaasir 'Auda, *Fiqh al-Maqashid: Inathatu al-Ahkam asy-Syar'iyyati bi Maqashidiha,* p.57.

Al-Maslahah can also mean peace as Allâh says in Sura al-Baqarah / 2: 228 as follows:

...وَبُعُولَتُهُنَّ أَحَقُّ بِرَدِّهِنَّ فِي ذَلِكَ إِنْ أَرَادُوا إِصْلَاحًا...

"... And their husbands have the better right to take them back in that period, if they wish for reconciliation ..."

Thus, *al-Maslahah* refers to the meaning of the benefits to be realized in order to achieve a good or better thing in human life. Every case containing benefit is *maslahah*, either effort to make it happen (*jalbu al-mashalih*) or that effort to avoid anything harmful (*dar'ual-mafasid*). There are definitions of *al-mashlahah* in *Usul Fiqh* which have a wide variety of versions but contain the same substance. Some of them are as follows:

a. Hujjatul Islam, Abu Hamid al-Ghazali (d. 505H):

الْمَصْلَحَةُ فَهِيَ عِبَارَةٌ فِي الْأَصْلِ عَنْ جَلْبِ مَنْفَعَةٍ أَوْ دَفْعِ مَضَرَّةٍ ، وَلَسْنَا نَعْنِي بِهِ ذَلِكَ ، فَإِنَّ جَلْبَ الْمَنْفَعَةِ وَدَفْعَ الْمَضَرَّةِ مَقَاصِدُ الْخَلْقِ وَصَلَاحُ الْخَلْقِ فِي تَحْصِيلِ مَقَاصِدِهِمْ ، لَكِنَّا نَعْنِي بِالْمَصْلَحَةِ الْمُحَافَظَةَ عَلَى مَقْصُودِ الشَّرْعِ وَمَقْصُودُ الشَّرْعِ مِنْ الْخَلْقِ خَمْسَةٌ : وَهُوَ أَنْ يَحْفَظَ عَلَيْهِمْ دِينَهُمْ وَنَفْسَهُمْ وَعَقْلَهُمْ وَنَسْلَهُمْ وَمَالَهُمْ ، فَكُلُّ مَا يَتَضَمَّنُ حِفْظَ هَذِهِ الْأُصُولِ الْخَمْسَةِ فَهُوَ مَصْلَحَةٌ ، وَكُلُّ مَا يُفَوِّتُ هَذِهِ الْأُصُولَ فَهُوَ مَفْسَدَةٌ وَدَفْعُهَا مَصْلَحَةٌ.

"Maslahah is a phrase to describe the grasp of manfa'ah (benefit) or the denial of mudlarat (harm). However, we do not mean it, because to attract benefits

and refuse harm is the goal of every human being and the necessity required in achieving goals. Indeed, what we mean by maslahah is to keep or maintain things that have been achieved by Syari', namely, the maintenance of religion, life, intellect, family, and property. Every case containing these five things is maslahah, and everything that negates these five things is mafsadah. Eliminating mafsadah is also part of maslahah itself."[48]

In his definition, al-Ghazali firmly stated that the *maslahah* in question is to protect things that have been objects of *Syari'* (Allâh and His Messenger) in the first place, that is, religion, life, intellect, family and property. *Maslahah* meant by al-Ghazali is not the one perceived by human reason, because this model of *maslahah* solely oriented to achieve the time-based goals of human life, not the one oriented towards achieving a lasting benefit of here and the hereafter. Al-Ghazali seems to prefer the two to be combined, although in the end the weight of his attention is to the benefit of the hereafter.

b. Imam al-Syathibi (d. 790 H):

فَقَدْ اِتَّفَقَتِ اْلأُمَّةُ بَلْ سَائِرُ الْمِلَلِ عَلَىَ أَنَّ الشَّرِيْعَةَ وُضِعَتْ لِلْمُحَافَظَةِ عَلَىَ الَّضرُوْرِيَاتِ الْخَمْسِ وَهِيَ الدِّيْنُ وَالنَّفْسُ وَالَّنسْلُ وَالْمَالُ وَالْعَقْلُ. لاَ يُقَالُ يَلْزَمُ عَلَىَ هَذَا اِعْتِبَارُ كُلِّ مَصْلَحَةٍ مُوَافَقَةٍ لِمَقْصِدِ الشَّارِعِ أَوْ مُخَالَفَةٍ وَهُوَ بَاطِلٌ لِأَناَّ نَقُوْلُ لاَ بُدَّ مِنْ اِعْتِبَارِ الْمُوَافَقَةِ لِقَصْدِ الشَّارِعِ لِأَنَّ الْمَصَالِحَ إِنَّمَا اُعْتُبِرَتْ مَصَالِحَ مِنْ حَيْثُ وَضَعَهَا الشَّارِعُ.

"All Muslims, even across sects, agree that the Syari`ah launched to keep five dharuriyat (primaries) for life, namely, religion, life, lineage, wealth, and

48 Abu Hamid Muhammad bin Muhammad al-Ghazali, *Al-Mustashfa* (Beirut: Dar al-Kutub al-Ilmiyyah, n.d.), vol. 1, pp. 286-287.

intellect. It is not to say that there are maslahah (benefit) in accordance with the objectives of Syari`ah, and others are not in conjunction with them. Such words are not appropriate, because in our opinion, maslahah is considered maslahah only if it has been endorsed by Syar'i."[49]

It is apparent in ash-Syathibi's opinion that not all *maslahah* can be used in legal decision. *Maslahah* which can be used as the legal reason is *maslahah* that has been set by *Syari'* (God) or in line with its objectives, in a sense not contradictory to the will of *Syari'*.

a. Al-Thufi (657-716H) divides *maslahah* into two categories, *maslahah* in the view of *'urf* (tradition) and *maslahah* in the view of *syar'iy*. at-Thufi says;

"*Maslahah* in view of the *'urf* (tradition) is all that lead to peace and benefit, such as trade as a means to gain profit. As for the perspective of Syari', *Maslahah* is a means (cause) that leads to the purposes by Syari', whether it be a means to make worship possible, or a community to prosper. Furthermore, *Maslahah* divided into two: *Maslahah* intended according to Syari's interests, such as worship, and *Maslahah* intended to provide benefits to the inhabitants of the earth and ease their endeavor to it."[50]

Al-Thufi did not explain the benefit of which categories that can be used as a source of law. However, through reading the concept he proposed, it can be seen clearly that both two categories can be used as source of legitimate law. It surely differentiates two different categories of Syari`ah: *Syari`ah dunyawiyah* and *Syari`ah ukhrawiyah* (*ta'abbudiyah*).

b. Yusuf Hamid al-Alim, a scholar in *Usul Fiqh*, after revealing some definitions of a number of scholars, gives the definition of *Maslahah* in

49 Asy-Syathibi, *al-Muwafaqat,* p. 17.

50 Mustafa Zaid, *al-Maslahah fi at-Tasyri' al-Islami wa Najmuddin at-Thufi*, p. 23.

the following words:

اَلْمَصْلَحَةُ الشَّرْعِيَّةِ هِيَ اْلأَثَرُ الْمُتَرَتِّبِ عَلَى الْفِعْلِ بِمُقْتَضِ الضَّوَابِطِ الشَّرْعِيَّةِ الَّتِيْ تُرْمِيْ اِلَى تَحْقِيْقِ مَقْصُوْدِ الشَّارِعِ مِنَ التَّشْرِيْعِ جَلْباً لِسَعَادَةِ الدَّارَيْنِ.

"Maslahah Syar`iyyah is the effect of an action in accord with the lines of Syar'iyyah which is launched to realize the goals of Syari', that is the happiness of all in this world and hereafter."[51]

Definition of al-Alim mentioned above is not different from the others before. It is even more conservative, especially when compared to the definition put forward by ath-Thufi. From the above discussion it is clear that *maqashid Syari`ah* is the secrets, purposes and reason behind every law legislated by Allâh. It means nothing but the realization of the benefit of all humankind, both in the world today and in the eternal life in the hereafter. Humanity benefit would be realized if all necessities, of primary-elementary (*ad-Dharuriyat*), secondary-complementary (*al-hajiyat*) and tertiary-supplementary (*at-Tahsiniyat*) are met and protected. These necessities are formulated in the concept of *ad-Dharuriyat al-khamsah* (five primary needs), some would call it *ad-dharuriyatu as-sittah* (six primary needs) which comprise; protecting religion *(hifzh ad-din),* protecting lives *(hifzh an-nafs),* protecting offspring *(hifzh an-nasl),* protecting the reason *(hifzh al-'aql),* protecting the honor *(hifzh al-'ird)* and protecting the property *(hifzh al-mal)*. When the six basic needs (*dlarury*) are met, even more, when those in six secondary level (*hajy*) and tertiary level (*tahsiniy*) are also met, then *maslahah* will be realized, and that is the goal of universal Syari`ah. This is the result of research by scholars of *Usul Fiqh* concerning Syari`ah laws found in the text (*nass*) about Syari`ah law and its reasons of enactment. In addition, these objectives can also be known through texts that explain the

51 Yusuf Hamid al-Alim, *al-Maqashidu al-Ammah* (n.p.: Dar al-Amaliyah li al-Kitab al-Islami, 1994), p. 140.

basic principles of Islamic law.[52]

At the beginning of its use, *al-hifzhu* better understood as a protection to prevent anything that could harm the existence of *ad-Dharuriyatu al-khamsah* or *as-Sitta*. For example, to protect potential damage to reason, *Syari`ah* forbids drinking alcohol. To protect the good and quality offspring, *Syari`ah* forbids adultery, sexual violence, and *liwath* (sodomy). The concept of *al-Hifzhu* to five or six necessities in this case is understood as the prevention and just-in-case defence.

Al-Syatibi developed the concept of *al-Hifzh* not only limited to a deterrence and defense (*al-difa'*), but also includes efforts of realizing (*al-Ijad*) the objectives of Syari`ah. According to him, *al-Hifzh* refers to two aspects: first, *al-hifzhu min janibi al-wujud*, namely the protection of its manifestations that can perpetuate the fulfillment of the necessities (*ad-dharuriyat*); and second*, al-hifzhu min janibi al-'adam*, namely the protection of its prevention against things that can eliminate the fulfillment of those necessities. Thus, in addition to its preventive side, *al-hifzh* in ash-Syatibi concept also contains curative side.[53] Some examples below might clarify:

1. Keeping the faith (*hifzh ad-din*). To keep the existence of religion (*hifzh ad-din min janibi al-wujud*), Islam legislates assorted teachings such as faith, prayer, fasting, hajj, zakat and the like, while keeping religion out of its elimination (*hifdz ad-din min janibi al-'adam*), the teachings of Islam legislates *jihad*, enjoining good and forbidding wrong, banning apostasy and others.
2. Keeping the life (*hifzh an-nafs*). To keep the existence of life (*hifzhu an-nafs min janibi al-wujud*), Islam prescribes efforts to look after the availability of clothing, food and shelter, while keeping from the elimination of life (*hifzhu an-nafs min janibi al-'adam*), Islam prescribes to ban quarrel, oppression, violence, and others.
3. Maintaining reason (*hifzh al-aql*). To keep the existence of reason (*hifzhu al-'aql min janibi al-wujud*), Islam legislates studying, thinking, and

52 Abdul Wahhab, *Ilmu Ushul Fiqh*, p. 197.

53 Asy-Syathibi, al-Muwafaqat, vol. 2, pp. 7-8.

contemplating the creation of Allâh, while to keep the reason out of its elimination (*hifzhu al-'aql min janibi al-'adam*), Islam prescribes ban on any action to eliminate the functions of reason.

4. Maintaining descendants (*hifzh an-nasl*). To keep the existence of offspring (*hifzhu al-nasl min janibi al-wujud*), Islam prescribes family law to be enacted before, during and after wedding, while to keep the offspring of its elimination (*hifzhu an-nasl mi janibi al-'adam*), Islam prescribe rules that prohibit adultery, *liwath*, and the like.

The concept of *al-hifzhu* offered by ash-Syatibi is more advanced compared to the previous concepts of *al-hifzhu* which only covers preventive measures. However, ash-Syatibi's concept seems inadequate to face modern context where awareness about equal rights of human beings is growing. While the concept of *al-hifzhu* by Jasser Ouda developed into *al-haqqu* (the right), making a paradigm shift from the keeping of something into a right to have something. Jaseer, as quoted by Amin Abdullah, outlines the progress of *al-hifzh* as follows:[54]

a *Hifzhu ad-din* (keeping religion) evolved into *haqq at-tadayyun wa al-'aqidah* (freedom of religion and belief). *Hifzhu ad-din* must be understood as an effort to maintain, protect and respect freedom of religion and belief.

b. *Hifzhu an-nafs* (keeping the soul) into *haqqu wa al-nafs al-hayat* (the right to life and to live). *Hifzhu an-nafs* must be oriented to protect the family and designed to give concerns to the institution of family.

c. *Hifzhu an-nasl* (keeping offspring) into *haqqu at-tanasul* (rights to have family and to reproduce).

d. *Hifzhu al-'aql* (keeping the reason) into *haqqu at-ta'aqqul wa at-tafakkur* (rights to understand and think). *Hifzhu al-'aql* must be understood as an effort to develop proper mindset and scientific research, to prioritize journey to seek knowledge, to avoid attempts to put down the workings of the brain, and so on.

54 Jasser Auda, *Maqasid al-Shari'ah*, p.3.

e. *Hifzhu al-mal* (maintain the property) into *haqqu at-tamalluk wa al-milki* (rights to ownership of estate and property).
f. *Hifzhu al-'ird* (keeping honor) becomes *haqqu al-ikram wa at-takrim* (rights to respect and to be respected).

This concept of rights is seen as more accommodating to the fulfillment of human needs rather than *al-hifzhu*, because *al-hifzhu* is the protection born out of will from the other parties whogive protection, while *al-haqqu* (right) is the awareness that something belongs to someone whose inherent rights are to be protected. The State, as the representative of Allâh's justice on earth, is obliged to guarantee these five or six basic needs as the rights of its citizens that should be met properly. The basic rights of citizens to be accommodated by the State are mandatory, not voluntary.

Discussion on *Maqhasid ash-Syari`ah* has developed very rapidly. Several books and monographs have been written specifically to show the important position of *Maqhashidu ash-Syari`ah* as a part of the system of Islamic law. The study of this theory has come to this moment that some of its key concepts have evolved rapidly. After *al-hifzhu* evolved into *al-haqqu*, now the concept of *al-hurriyah* (freedom) is thought more likely to be discussed with the new awareness of Human Rights.

Al-hurriyah is freedom to perform activities so long as they are in line with their already built-in responsibilities. But there is no responsibility whatsoever for anything in which no freedom to choose. The concept of *al-hurriyah* is also considered more in accord with the vision and mission of the Islamic Syari`ah which aims to liberate people from oppression, exploitation, and slavery in its most general sense, i.e. enslavement of human by human, slavery of one's self by objects, a kind of slavery by all forms of personal pleasure, pride and vanity, as well as other matters that become human ego tendencies.

Put simply, the views of the Muslim scholars of 'classic' and contemporary Islam can be formulated into a single concept; based on the texts of the Qur'an and Sunnah, Allâh has given rights to human ever since s/he is still in the womb, even before a human ever exists, completed with the "freedom"

to receive and retain the rights. Allâh has given to all human, whoever and wherever they are, two things at once, namely the rights (*al-huquq*) and the freedom to get it rights (*al-hurriyah*). Accordingly, those two things must be protected by religion. Thus, Islam provides the concept of *al-hifzhu* (protection). Religion or Syari`ah actually protects two things, namely the rights and the freedom. Religion protects the rights and the freedom of religion, of thought, of life, of reproduction, of ownership, and also, the rights and freedom to be respected as human being.

Therefore, since *maslahah* is the ultimate goal of all provisions of the law revealed by Allâh, then the efforts of interpretation and *ijtihad* to formulate Islamic law from the sacred texts must be based on this Islamic goal. Law which in practice doesnot bring benefit is not the law by the will of Allâh, even if it is formulated from the sacred texts. On the other hand, law which brings benefit, goodness and peace must be referred to as the law of Allâh even if it is not formulated directly from the scriptures.

C. Principles of the Application of Islamic Law

Islamic law has a number of principles so that the purposes of its application can be achieved. According to Khudari Bik, there are three principles that form the basis for the application of Islamic law, namely:[55]

1. *Eliminating Trouble* (*raf'u al-haraj*)

The first principle in the application of Islamic law is to eliminate the difficulties (*al-haraj*). Islamic Syari`ah was brought down into the earth in order to eliminate troubles that befall human being, not the other way around that it gave birth to new difficulties. There are texts that prove that the principle of Islamic Syari`ah is to ease people's life and eliminate the difficulties that surround them. This is partly confirmed in the verses of the Qur'an and the hadith below:

55 Muhammad Khudari Bik, *Tarikh at-Tasyri' al-Islami*, (Beirut:Dar al-Fikr al-Islami, 1967), pp. 15-18.

يُرِيدُ اللَّهُ بِكُمُ الْيُسْرَ وَلَا يُرِيدُ بِكُمُ الْعُسْرَ

"Allâh intends every facility for you; He does not want to put you to difficulties" (Qur'an, al-Baqarah, 2: 185)

لَا يُكَلِّفُ اللَّهُ نَفْسًا إِلَّا وُسْعَهَا

"Our Lord! Lay not on us a burden greater than we have strength to bear." (Qur'an, al-Baqarah, 2: 286)

يُرِيدُ اللَّهُ أَنْ يُخَفِّفَ عَنْكُمْ وَخُلِقَ الْإِنْسَانُ ضَعِيفًا

"Allâh doth wish to lighten your (difficulties): for man was created weak (in flesh)" (Qur'anic Verse. An-Nisa, 4:28)

وَمَا جَعَلَ عَلَيْكُمْ فِي الدِّينِ مِنْ حَرَجٍ

"He has chosen you, and has imposed no difficulties on you in religion."(Qur'an, al-Hajj 22: 78).

إِنَّمَا بُعِثْتُ بِالْحَنِيفِيَّةِ السَّمْحَةِ

"I was sent to bring religion in favor of truth and easiness" (HR. Ath-Thabarani).[56]

The arguments mentioned above prove that one of the main principles of Islamic Syari`ah is to eliminate all difficulties and worries. This means that Islam provides convenience to its followers to implement all the provisions in accordance with their capacity. If the Islamic Syari`ah imposes an injunction or prohibition which exceeds the limits of human ability, then Islam would be difficult to be accepted by humans created with weak nature. The entire teachings and rules brought by Islam not out of human nature (*fitrah*). Since

56 Abu al-Qasim at-Thabarani, *al-Mu'jam al-Kabir li at-Thabarani* (Cairo: Dar Ibnu Taimiyyah, 1994), vol. 8, p. 170.

human beings are by nature weak, Islamic Syari`ah should not impose task too hard to carry out.[57] This has become one of the reasons why Islam survives this far, namely because it is easy to run. From this principle of eliminating the difficulty, various legal waivers (*rukhsah*) were introduced. For example, for those who are ill or traveling may not be fasting, eating haram for a person in a desperate condition can be permissible, *tayammum* (ablution not with water but sands), forgiveness in certain penalties, diversion of sanctions and others.

2. Minimize people's load (*taqlil at-takalif*)

This principle is a logical consequence of the first principles. Islamic Syari`ah is a comfort so that the laws are not being a burden too much. If too many rules are given, then the space of activity will be cramped and difficult. If more rules of law are prescribed, more violations may occur. Al-Qur'an, as a primary source of Islamic law, does not give detailed and in depth rules. The total number of legal provisions in the Qur'an is not many and these are easy to understand. This is confirmed by Qur'anic verse. Al-Maidah / 5: 101-102 as follows:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَسْأَلُوا عَنْ أَشْيَاءَ إِنْ تُبْدَ لَكُمْ تَسُؤْكُمْ وَإِنْ تَسْأَلُوا عَنْهَا حِينَ يُنَزَّلُ الْقُرْآنُ تُبْدَ لَكُمْ فَا اللَّهُ عَنْهَا وَاللَّهُ غَفُورٌ حَلِيمٌ قَدْ سَأَلَهَا قَوْمٌ مِنْ قَبْلِكُمْ ثُمَّ أَصْبَحُوا بِهَا كَافِرِينَ

O you who believe! Ask not about things which, if made plain to you, may cause you trouble. But if you ask about them while the Qur'ân is being revealed, they will be made plain to you. Allâh has forgiven that, and Allâh is OftForgiving, Most Forbearing. Before you, a community asked such questions, then on that account they became disbelievers.

57 Ibnu Asyur, *Maqashid as-Syariah*, p. 60.

The above verse is in line with the events narrated in the hadith of the Prophet the following:

عَنْ أَبِي هُرَيْرَةَ قَالَ قَالَ رَسُولُ اللَّهِ صَلَّى اللهُ عَلَيْهِ وَسَلَّمَيَا أَيُّهَا النَّاسُ كُتِبَ عَلَيْكُمُ الْحَجُّ فَقَامَ رَجُلٌ فَقَالَ فِي كُلِّ عَامٍ يَا رَسُولَ اللَّهِ فَأَعْرَضَ عَنْهُ ثُمَّ عَادَ فَقَالَفِي كُلِّ عَامٍ يَا رَسُولَ اللَّهِ قَالَوَمَنِ الْقَائِلُ؟ قَالُوا فُلَانٌ قَالَ وَالَّذِي نَفْسِي بِيَدِهِ لَوْ قُلْتُنَعَمْ لَوَجَبَتْ وَلَوْ وَجَبَتْ مَا أَطَقْتُمُوهَا وَلَوْ لَمْ تُطِيقُوهَا لَكَفَرْتُمْ

From Abu Hurairah, he said that the Messenger of Allâh said, "O people, Hajj is obligatory upon you!" Then someone asks, "Is it every year, O Messenger of Allâh?" He ignored the question. That someone once again asked, "Is it every year, O Messenger of Allâh?" "Who asks that just now?" He asked. "Fulan", replied the companions at that time. "By the One that my soul was in His hands, if I say yes, it will become mandatory. If it is already mandatory, you will not be able to execute it. And, if you are unable to perform, you must deny it. "(HR. Ad-Daruquthni).[58]

3. Gradual Enactment of Law (*at-Tadarruj fi at-tasyri'*)

Before the arrival of Islam, different traditions have already rooted deep among the Arabs. Some of these traditions are maintained, while others must be abandoned. To eradicate bad traditions, Islam doesn't eliminate them once and for all without compromise, but it does it in a gradual manner. With this approach, Islam can be accepted to the Arabs at the time. In a mission to invite people to worship Allâh Almighty, the Prophet did not destroy the whole idols that were around the Ka'ba in the first place. Instead, he initially invited his companions secretly to embrace Islam. When preaching in Mecca, he used two approaches, namely covertly and overtly. Similarly, the Qur'an as a book

58 Abu Hasan al-Ali ad-Daruqutni, *Sunan ad-Daruqutni* (Beirut: Muassasah ar-Risalah, 2004) vol. 3, p. 340.

of guidance also doesnot revealed 30 chapters at once, but sent down gradually for approximately 23 years. This gradual method aimed that the Islamic Syari`ah can be implemented gradually until it finishes in its completeness.[59]

This principle is evident among others in banning drinking alcohol which was practiced in the tradition of Arab society at the time. Whenever an event or a particular celebration occurs, surely there alcoholic beverages are served. To discourage people from drinking alcohol, Islam doesnot directly prescribe the ban, but through the specific stages until it is absolutely forbidden for consumption. Allâh said as follows:

1. The first verse related to alcohol simply explained that the palm fruit as the main ingredient can be made intoxicating drinks and can also become source of a good income, Qur'anic verse an-Nahl, 16: 67 comes as follows:

وَمِنْ ثَمَرَاتِ النَّخِيلِ وَالْأَعْنَابِ تَتَّخِذُونَ مِنْهُ سَكَرًا
وَرِزْقًا حَسَنًا إِنَّ فِي ذَلِكَ لَآيَةً لِقَوْمٍ يَعْقِلُونَ

"And from the fruit of the date-palms and the vine, ye get out wholesome drink and food: behold in this also is a Sign for those who are wise."

2. In Medina, the verse about alcohol was revealed again. This verse did not explicitly forbid alcohol, since some Muslims still consumed it expecting the benefits contained in the drinks, as in the Qur'anic verse Al-Baqarah, 2: 219 it was proclaimed:

يَسْأَلُونَكَ عَنِ الْخَمْرِ وَالْمَيْسِرِ قُلْ فِيهِمَا إِثْمٌ كَبِيرٌ وَمَنَافِعُ
لِلنَّاسِ وَإِثْمُهُمَا أَكْبَرُ مِنْ نَفْعِهِمَا وَيَسْأَلُونَكَ مَاذَا يُنْفِقُونَ

59 According to Manna' al-Qatthan, reasons behind the Qur'an being revealed gradually are (a) to affirm the Prophet as a bearer of messages (b) as a challenge to the infidels (c) in order that it becomes easier to memorize and study (d) in order that Al-Qur'an becomes more dialogic to the reality then makes it possible to internalize its teachings in the hearts of believers gradually too. Manna' Khalil al-Qatthan, *Tarikh at-Tasyri' al-Islami (at-Tasyri' wa al-Fiqh) (*Beirut: Muassasah ar-Risalah, 1993), pp. 47-53.

قُلِ الْعَفْوَ كَذَلِكَ يُبَيِّنُ اللَّهُ لَكُمُ الْآيَاتِ لَعَلَّكُمْ تَتَفَكَّرُون

"They ask you (O Muhammad SAW) concerning alcoholic drink and gambling. Say: "In them is a great sin, and (some) benefit for men, but the sin of them is greater than their benefit." And they ask you what they ought to spend. Say: "That which is beyond your needs." Thus Allâh makes clear to you His Laws in order that you may give thought."

1. One day Abdurrahman bin Auf made a feast for the community in the form of food and alcohol as a serve. All were present in the banquet and drank. Until it was time of *maghrib*, those who were still drunk went to pray in congregation. As a result, the reading of prayer became erratic and disruptive.[60] For this not to happen again, a verse that forbid prayer while in a drunken state came down, namely Qur'anic verse an-Nisa, 4:43, as follows:

يَا أَيُّهَا الَّذِينَ آمَنُوا لَا تَقْرَبُوا الصَّلَاةَ وَأَنْتُمْ سُكَارَى حَتَّى تَعْلَمُوا مَا تَقُولُونَ

"O ye who believe!Approach not prayer with a mind befogged, untill ye can understand all that ye say."

After the verse was revealed, the Muslims were no longer taking wine ahead of time of the prayers for fear of drunk. They drank only after *Isha* prayer and up until just before dawn. When it was dawn, they were already clearheaded. Muslim society was still drinking wine up to that time.

2. Once Uthbah bin Malik entertained the public, both the *Muhajirun* (Emigrants) and the *Anshar* (Helpers), with camel meat and alcohol beverages. When in the end all were drunk, the situation became uncontrollable. Everyone present in the banquet boasted his tribe

60 Ibnu Katsir, *Tafsir Ibnu Katsir*, vol. 2, p. 309.

vilifying each other. The climax came when one of the guests, Sa'ad bin Abi Waqqas had been beaten. The companions then complained about the incident to the Prophet. Accordingly, came down a verse forbidding wine completely, namely Qur'anic verse al-Ma'idah / 5: 90-91:[61]

يَا أَيُّهَا الَّذِينَ آمَنُوا إِنَّمَا الْخَمْرُ وَالْمَيْسِرُ وَالْأَنْصَابُ وَالْأَزْلَامُ رِجْسٌ مِنْ عَمَلِ الشَّيْطَانِ فَاجْتَنِبُوهُ لَعَلَّكُمْ تُفْلِحُونَ (٠٩) إِنَّمَا يُرِيدُ الشَّيْطَانُ أَنْ يُوقِعَ بَيْنَكُمُ الْعَدَاوَةَ وَالْبَغْضَاءَ فِي الْخَمْرِ وَالْمَيْسِرِ وَيَصُدَّكُمْ عَنْ ذِكْرِ اللَّهِ وَعَنِ الصَّلَاةِ فَهَلْ أَنْتُمْ مُنْتَهُونَ (١٩)

"O you who believe! Intoxicants and gambling, (dedication of) stones, and (devination by) arrows, are an abomination - of Satan's handiwork: eschew such (abomination), that ye may prosper. Satan's plan is (but) to exciteenmity and hatred between you, with intoxicants and gambling, and hinder you from the remembrance of Allah, and from prayer: will ye not then abstain?"

As this verse was revealed, after three other verses, the companions were no longer drink wine. Allâh established the law in evolution in order that law provide *maslahah* and not otherwise caused difficult and troublesome. Lessons can be drawn from the above is that to eradicate malevolent already ingrained in the society should be done gradually. In the above case, if Syari`ah prohibits wine abruptly, it is most likely the ban would be difficult to be accepted by the public at the time.

D. Allah's Rights and *Adami* Rights

In the discussion of the philosophy of Islamic jurisprudence (*Usul Fiqh*), two terms are known: Rights of Allâh (*haq Allâh*) and rights of human (*haq adami*). A study by Islamic jurists (*fuqaha*) on Islamic texts (*an-nushus*) that

61 Muhammad Ali as-Shabuni, *Tafsir Ayat al-Ahkam* (Beirut: Dar Ibnu Abbud, 2004), vol. 1, p. 193.

describe the Syari`ah laws has brought about the emergence of these terms. Besides proving that the purpose of law is for human benefit, these scholars also found that the benefit itself is two kinds: universal and individual benefits. This means that an act prescribed (*taklif*) by the Syari`ah is certainly no other than for the benefit of humankind, either collective-universally or individually. Syari`ah laws that suggests benefit for collective-universal party is categorized as "rights of Allâh". The rights are attached to Allâh (*haq Allâh*), because the benefit gained is solely for all human beings collectively. While the laws of Syari`ah that suggests individual human benefit is categorized as "rights of human (*haq Adami*)".[62]

There are theories on the Rights of Allâh and Rights of Human as follows:

a. Al-Syatibi, a scholar in *Maliki* School of law. He says that there are three categories of the Rights of Allâh and the Rights of human, namely [1] Rights of Allâh, [2] Rights of Allâh and Rights of Human in which the Rights of Allâh are more dominant, and [3] Rights of Allâh and Rights of Human in which the Rights of Human are more dominant.[63] Thus, in his opinion there is no law of Allâh separated from the rights of Allâh.[64] Given that the Rights of Allâh are in essence for the public good, then the statement that there is no law of Allâh separated from the rights of Allâh means that no law of Syari`ah that is purely intended for the benefit of human individually, but in itself must contain the public good too. Asy-Syathibi also argues that there is no law of Allâh whose two sides

62 Linguistically, the word *haq* in Arabic refers to several meanings: (a) decree and obligation (b) comprising all aspects in one (c) one of Allah's names [al-Haq] (d) truth (e) justice (f) faith (g) one of the Qur'an's or Islam's names (h) others such as ownership, estate and , and part. All these meanings are taken from the word *haq* in Al-Qur'an. In Fiqh, what is meant by *haq* is everything declared as being owned by Allah or somebody but is in responsibility of others. See: Muhammad Abdul 'Athy Muhammad 'Aly, *al-Hukm at-Taklifi wa ma Yata'allaqu bihi min Ahkam*, (Cairo: Dar al-Hadis, 2007), pp. 183-187.

63 Ibrahim bin Musa as-Syatibi, *al-Muwafaqat,* pp. 539-542.

64 In this context, as-Syatibi says, "every law of Syari`ah cannot be seperated from Rights of Allâh, that is, it must be dedicated to Allâh alone. It is obligatory for every follower of Islam to bow themselves to the worship of Allâh, enjoin good and forbid wrong. If there is law of Syari`ah assumed to be of the Rights of Human, it is actually not as it seems. There are indeed the rights of Allâh in it, but the Rights of Human are dominant." Asy-Syathibi, *al-Muwafaqat,* p. 538.

(referring to Rights of Allâh and Rights of Human) are balanced. In other words, in every law of Allâh there must be the dominant party, either one of the Rights of Allâh (the public good) or one of the Rights of Human (the individual good).

b. Scholars in *Usul Fiqh* from *Hanafiyah* School of Law classify it into four, namely: Pure Rights of Allâh, Pure Rights of Human, Rights of Allâh and Rights of Human. The first side is more dominant, and the last is for the Rights of Allâh and Rights of Human in which the second side is more dominant.[65] Within these four categories, *Hanafiyah* scholars give a special space for the Rights of Human.

Of the two models of classification it can be seen that ash-Syatibi is more theocentric (emphasizing the Rights of Allâh), while *Hanafiyah* scholars are more anthropocentric (emphasizing Rights of Human). Two models are based on *istiqra*' (deductive research), in which researcher scrutinizes the texts of Syari`ah law in general and then draws specific conclusions.

According to *Hanafiyah* scholars, the entire Syari`ah laws lead to the goal of providing benefits to all human beings, both in general and personal. That the *Hanafiyah* mentions common good in terms of the Rights of Allâh is to give the impression of the sacred for *maslahah* that covers the whole of human's interests. In contrast to this, ash-Syatibi says that a law is categorized as the Rights of Allâh because it is *ta'abbudi* in nature in which the authority of Allâh over the law is inviolable.[66]

Although they seem to be different, in the methodical-practical level both have the same conclusion. The laws which are categorized as the Rights of Allâh are the provisions of Syari`ah that bind to all the people for the benefit of them in general. One cannot abort it but Allâh alone. It must always be conducted in accordance with the manner and purpose of its enactment. Syari`ah law which is part of the Right of Human is a provision prescribed for the benefit of human personally, and can be aborted its implementation by those victimized or harmed.

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65 Abdul Wahhab, *Ilmu Ushul Fiqh,* pp. 210-211, Muhammad Abu Zahrah, *Ushul Fiqh* (Cairo: Dar al-Fikr al-'Arabi, nd.), p. 323.

66 Abdul 'Athy, *al-Hukm at-Taklifi,* p. 185.

To determine whether a provision of Syari`ah law is binding and cannot be aborted, then we should see the texts explaining the provisions of the law. If a text explains that the provisions of Syari`ah law in question may alternately be replaced, then these are classified as Rights of Human. Quite contrarily, if a text explains that the law cannot be replaced, or there is another text stating that the provisions of law is binding and cannot be contested individually, then these are classified as the Rights of Allâh.

Herein lays the possibility of dissenting of opinions among scholars of Islamic Syari`ah in putting whether a provision is in the category of Rights of Allâh or of human. Perhaps, it may happen that a scholar finds text which describes certain statutory provisions as replaceable, then they are being classified as the Rights of Human, while other scholars don't see the same and categorize them as the Rights of Allâh.

Distribution of Islamic law related to dimensions of the Rights of Allâh and the Rights of Human in Islamic Law according to *Hanafiyah* scholars are as follows:

a. *Laws which have the Rights of Allâh Dimension*

In the laws of Syari`ah, dimension of the Rights of Allâh aspires to the benefit in general nature. Humans as a legal subject should implement the provisions of the law accordingly. They may not underestimate or, even more, cancel it. In any way whatsoever these laws should be implemented and cannot be contested by any individual. According to *Hanafiyah* scholars, there are at least eight kinds of actions ruled by the laws as in dimension of the Rights of Allâh, here as follows:[67]

1) The act of pure dimension of worship, such as prayer, fasting, *zakat*, *hajj*, and the underlying foundations of faith. The purpose of these rituals is none other than for the sake of establishing piety. Enactment of these essential parts of religion is a prerequisite for the creation of a peaceful and serene society.

67 Wahbah, *Ushul al-Fiqh al-Islami*, vol. 1, pp. 154-157.

2) The act of worship which has financial dimension, for example, *zakat fitrah*. On one side, it is categorised as a worship because it is carried out in order to draw closer to Allâh by giving donations to the needy and the poor. On the other hand, it has financial dimension, because the *zakat*not only involves the person who gives *zakat*, but also those who become financially dependent on that person.[68]
3) Paying tribute (tax) that contains the meaning of worship. Islamic Syari`ah establishes the obligation to pay tribute of ten percent of the crop on non-Muslims living in Islamic compound, or ten percent of the seeds or fruits that have been trafficked for non-Muslims who trade in *Darul Islam*. This is called the *'usyr*.[69]
4) Pay tribute as a sanction, such as payments of *kharaj. Kharaj* payments are charged to non-Muslims as security costs being in the compound of the Muslims. Both *kharaj* and *'usyr*, all set for the benefit of the public.
5) *Uqubah Kamilah*, as *had* to adultery, theft, *khamer* consumption, and various *ta'zir* imposed by the government. According to *Hanafiyah* scholars, the sanctions are included in the corridor of the Rights of Allâh because their enactments are intended for the public good.
6) *Uqubah Qashirah*, such as obstruction of the inheritance for heirs because they kill people who will inherit the property.
7) Sanctions which have dimensions of worship, such as *kaffarat* for violators of the oath. The offenders are penalized in these sanctions which have in

68 According to Abdul Wahhab Khallaf, included in this catagory is not only *zakat fitrah,* but also *zakat mal* because, zakat is not only obligatory for the adults and the conscient, but also for children and non-conscient (like mentally ill adults) as most scholars (*jumhur ulama*) agree on. see Abdul Wahhab Khallaf, *Ilm Ushul Fiqh,* pp. 210-211.

69 This obligation is put based on *sunnah, ijma'*, and rational argument. The Prophet says, "'*Usyr* is obligatory for Jews and Christians. It is not obligatory for Muslims." The above mentioned ijma' which is used as the argument is an act by Umar bin Khattab before the Companions when he sent officials to take *'Usyr* and no one denied the act. The rational argument is that every non-muslim trader who traveled from one place to another at that time needed assurance to their safety and security of their belongings. For that reason, the regions where these traders entered may have compensations to issue assurance for their safety and security. see Ministry of Waqf of Kuwait, *al-Mausu'ah al-Fiqhiyyah al-Kuwaitiyyah* (Kuwait: Dar as-Salasil, nd.), vol. 30, pp. 102-103.

them elements of worship such as the freeing of a slave or providing food for the poor.

8) A stand-alone Right, such as the obligation of a fifth portion of *ghanimah* to be distributed for the common good.[70]

b. *Laws which have the Rights of Human Dimension*

Syari`ah law included in this category is prescribed for individual well-being, such as legal provisions in *mu'amalah*. Because its nature is individual, then such rights are given to one possessing the rights. For example, in the cases of debts, the creditors are entitled of being paid back for the money they lend. However, creditor may also liberate the debt.

c. *Laws which have the Rights of Allâh and the Rights of Human Dimensions at the Same time, but the Rights of Allâh are More Dominant.*

For example, in the law of *had qadzaf* (accusing a person of committing adultery), on the one hand, it belongs to Allâh because there are aspects that can realize the public good in the form of maintaining human dignity, as well as can prevent hostilities. On the other side, *had qadzaf* has personal benefit by eliminating the blemish that afflicts those accused of adultery and restoring their reputation. However, the first side is more prominent than the second, so that the sanctions cannot be invalidated by the person as an individual. But those sanctions can be aborted by Allâh through the individual and social repentance.

d. *Laws which have Dimensions of the Rights of Allâh and of Human but the Rights of Human are More Dominant*

Hanafiyah scholars give an example to "*qishas* punishment" for those

70 *Ghanimah* is one of the state's income in the past. It is treasure gained through wars against infidels. Therefore this treasure is also known as war's booty. Abi Ya'la Muhammad Bin Husain Al-Farra' al-Mawardi, *Al-Ahkam As-Sulthaniyyah*, (Bairut: Dar al-Kutub, 1983), p. 136.

who kill someone intentionally.[71] This penalty has two sides. The first side is the Rights of Allâh (the public good). The purpose of this sentence is to maintain human survival and to reduce crimes, butin *qishas,* there are also the Rights of Human (welfare of the individual) that may reassure the family of the victim with the killer being executed accordingly. In this case, there are both the Rights of Allâh and the Rights of Human, but the Rights of Human are more dominant as indicated by granting authority to the family of the victim to forgive the perpetrator (Qur'anic verse Al-Baqarah, 2: 178). However, even if the perpetrators is forgiven, it does not mean that the perpetrator can be completely free from punishment. The court must still punish the perpetrators through the mechanism of *diyat* or *ta'zir*.

If we pay attention to Hanafiyah opinions , all provisions of Syari`ah law regarding criminal sanctions are in dimension of the Rights of Allâh, namely, intended to give the benefit to the public. Some of them are purely Rights of Allâh, such as *had* for theft and adultery. Thesanctions should still be implemented even if forgiveness has been given by the victims or the family of victims, while the other is a combination of the Rights of Allâh and the Rights of Human, such as *had qadzaf*. It is classified as provision dominated by the dimension of the Rights of Allâh so that its enactment cannot be invalidated by the victim who already forgives the offender whatsoever. *Had qishas* is different. It is included in dimension of both the Rights of Allâh and the Rights of Human, with the Rights of Human however are dominant. That means the execution of *qishas* is up to the victims' families. They can ask *qishas* to be implemented or aborted by forgiving the offenders. The court may still replace it with another penalty.

Implementation of laws in the category the Rights of Allâh and the Rights of Human in the context of *hudud* are actually still in dispute among

71 In essense, *Qishas, had* and *ta'zir* are legalized as punishment for individuals committing crimes. But these three are put in different positions. *Qishas* is put against committer of crimes pertaining the body/soul (*jinayat al-abdan*) whose purpose is to maintain life (*hifdzu an-nafs*). Whereas *had* is put against committer of crimes pertaining the estate, reason, and respect (*hifdzu al-mal, 'aql, 'a'radl)*. *Ta'zir* is different. It is not decided by Syari`ah but by the government.

scholars. Different from the *Hanafiyah* scholars, who argue that in the case of *had qadzaf* what is more dominant is the Right of Allâh so that the penalties cannot be canceled, Imam Shafi'i, as quoted by al-Kasani, states that *had qadzaf* is categorized as pure Rights of Human so that its implementation can be nullified once the victim gives forgiveness. The different opinion on whether this *had* is part of the Rights of Allâh or of Human shows that this categorization is in fact *ijtihadi*. Therefore, if there is argument that the law of *had* on theft and adultery can be aborted, then it is classified as a legal dimension of the Rights of Human.

Something important to note in the concept of the Rights of Allâh and the Right of Human is that the Rights of Allâh is defined as the right pertaining to human welfare in general (not individual), following ash-Syathibi's concept, and the rights that have divine dimension, as in the concept of *Hanafiyah* scholars. The problem, as mentioned above, is their difference in definitions, categories, and implementations of both types of rights in the categories of criminal penalties. These differences in fact also show the possibility to redefine what we call the Rights of Allâh as human good in general and not in individual. Because the Rights of Allâh are concerning the public good, then the mechanism to determine whether a particular criminal penalties were included in the category of Rights of Allâh or not, should be done through public deliberations. This mechanism is not really a new thing in Islam, because although it has differences in size and volume, mechanism of *ijma'* (consensus) in Islamic law has a wide space to make it possible.

Another point to note is that these two categories of law, the Rights of Allâh and the Right of Human, both can be aborted. If by the Rights of Human, individuals can be forgiven, then by the Rights of Allâh, the human's sin can be annulled through individual and social repentance. In a brief discussion by some Muslim scholars a question arose: "If *haq Allâh* means exactly as *haq al-mujtama'* (the Rights of People), because they both lead to the same purpose, namely to realize the public good, then is it possible for a ruler as Allâh's representative on earth to remove those rights?" My answer is this: "In the laws of the worldly affairs (*al-jaza 'al-dunyawiy* or *al-uqubat ad-dunyawiyah*), such as punishment for theft, adultery, defamation, death

penalty (*qishas*), then as a representative of Allâh, as well a representative of the community, a ruler may abort the penalties and replace them with other punishments which are more beneficial". Allâh knows the best.Chapter Three

Hudūd In Islamic Law

A. Definition of *Hudūd*

Hudūd is part of *uqubah* (criminal punishment) in Islamic law as a result of *jarimah* and *jinayah* committed by the perpetrator. *Uqubah* is part of discussion in *jarimah* (criminal act) and *jinayah* (criminal law).

1. Definition of Jarimah and Jinayah

Jarimah is any prohibited act by Syari`ah that caused punishment under *had* (pl.*hudūd*; prescribed punishment) and *ta'zir* (discretionary punishment). These prohibited acts could be the abandonment of obligation or the violation of what is prohibited. Any other prohibited acts with no specific punishment stated above is not categorised as *jarimah*. There are ulama (Muslim scholars) who argued that *jarimah* is synonimous with *jinayah* in the case where *jinayah* is defined as any violation of six basic human needs (*ad-dharuriyyah al-sittah*), namely: the protection of religion, life, lineage, dignity, thought and wealth. According to this definition, *jinayah* include *qishās* (the law of retaliation), *hudūd* (prescribe punishment), injuring, beating and abortion. However, there are also some ulama who defined *jinayah* more specific than *jarimah* to refer only to *qishās* and *hudūd*.

There are four categories of *jinayah* and *jarimah*, when they are defined as synonimous, namely: 1) *Jarimah* or *jinayah qishās*; 2) *jarimah* or *jinayah hudūd*; 3) *jarimah* or *jinayah diyat*; *jarimah* or *jinayah ta'zir*.

2. Definition of Hudūd

Hudūd is a plural form of *had,* which means "to prevent (*al-man'u*)." Punishment (*uqubat*) also means *hudūd* because of its function to prevent prohibited acts under Syari`ah. In the Qur'an, the word *hudūd* is mentioned 13 times that refers not to mean punishment, but to any limit determined by God. The discussion of *hudūd* in the Qur'an can be found in the following surah: one verse on fasting (al-Baqarah: 187), six verses regarding separation/

divorce (al-Baqarah, 229-230), one verse in the context of inheritance (an-Nisa', 4:13), one verse on *dhihar* (al-Mujadilah, 58:4); one verse on rights and duties after separation (at-Thalaq, 65:1); two verses related to God's creation. There is no verse in the Qur'an to refer *hudūd* as *jarimah* or *jinayah*. Meanwhile, in Islamic society, the term *hudūd* is one important term. Thus, the meaning of *hudūd* has shifted.

According to Hanafi scholars, terminologically *had* is a criminal punishment regulated under Syari`ah to protect God's sovereignity (related to universal and collective human rights).[72]

Ta'zir differs from *had* in term of type and standard of punishment, in which *ta'zir* is determined by *qadhi* or judge. Similarly, *qishās* is unlike *had* for the reason that although the sanction is determined by Syari`ah, it governed to protect human's rights (individual human right), not God's rights (universal human's rights).[73] Different from that of Hanafi scholars, the majority of ulama (*jumhur ulama*) argued that *had* means legal sanction where type and its standard is governed by God, be it is aimed to protect human rights or God's rights.[74]

Different opinions among Muslim scholars on the definition of *hudūd* stated above influenced the number of categorisation consisted in *hudūd*. According to Hanafites, there are five types of *hudūd* under God's rights,

72 *Jarimah* as God's rights is related to social rights collectively aims at giving safety to social system in the community. Human rights are related to individual rights in society. Punishment (*uqubat*) becomes God's collective rights aim to protect communal wellbeing. These communal wellbeing includes: protection of human dignity (*al-a'radh*), lineage (*al-anshab*), wealth (*al-amwal*), thought (*al-uqul*), and life (*al-anfus*).There are *uqubat* that belong to God's rights collectively, to human individually and to both God and human collectively and individually. *Uqubah* related to God's rights can not be annuled by human beings. On the contrary, the annulment is possible only by God's forgiveness or by human repentance (*taubah wa islah*). On the other hand, the annulment of *uqubah* as individual human's rights can be attained through asking forgiveness individually.More disscussion can be found in sub chapter of "God's right and human right." See Wahbah, *al-Fiqh al-Islami*, vol.6, p. 12, and Abdul Qadir Audah, *at-Tasyri' al-Jina'i al-Islami* (Beirut: Muassasah ar-Risalah, 1992), vol. 1, p. 126.

73 Al-Zuhaily, *Al-Fiqh al-Islami,* vol.6, p.12.

74 Al-Zuhaily,*Al-Fiqh al-Islam,*vol. 6, p.12.

namely: *had as-shariqah* (penal law of theft), *had az-zina* (penal law of adultery), *had ash-shurbi* (penal law of drinking intoxication), *had as-sukri* ((penal law of drunk), dan *had al-qadzaf* (penal law for making unproven accusation of illicit sex). In the mean time, according to the majority of *ulama*, *hudūd* is divided into eight categories, namely: *had as-sariqah* (penal law of theft), *had az-zina* (penal law of adultery), *had ash-shurbi* (penal law of drinking intoxication), *had al-qadzaf* (penal law of making unproven accusation of illicit sex), *had al-qishās* (penal law of retaliation), *had ar-riddah* (penal law of apostacy), *had al-baghyu* (penal law of rebellion), dan *had quttha'u at-thariq* (penal law of highway robbery).[75]

Ibnu Jizzy al-Maliki stated that there are 13 kinds of criminal punishment in *jinayah* and *jarimah*. They are: killing, beating, committing illicit sexual relationship, defamation, drinking intoxicating drink, theft, rebellion, apostacy, hypocrisy, reviling Allah, His messenger and His Angel, practising witchcraft, and neglecting sholat and Ramadhan fasting.[76]

The above mentioned elaboration shows that ulama have various definitions of *jarimah* or *jinayah* and have also different opinion in deciding what are being included in the categorisation of *hudūd.* This can be enough evidence to nullify the types of punishment which are still being disputed . This is in line with *fiqh* (jurisprudence) rule called: a*l-Hudūd Tudra'u bi as-Syubuhat* (*hudūd* ordinance can be avoided by incertitude), including incertitude in the schools of law, which is seen in the above different opinion.

Because *hudūd* is defined as punisment determined by God and as the rights of God, they cannot be exchanged, replaced, or altered with any other provisions and no one should grant forgiveness.[77] However, the phrase *cannot be replaced or altered* seems unsuitable here, because from the history of the Prophet Muhammad, it can be learned that in several cases like adultery or killing, the Messenger tried to find alternatif ordinances to

75 Al-Zuhaily, *Al-Fiqh al-Islam*, vol.6. p.13.

76 Audah, *at-Tasyri' al-Jina'i*, vol. 2, p. 540

77 Ahmad Bahiej, *Memahami Keadilan Tuhan Dalam Qishās Dan Diyat (Understanding God's Justice in Qishās (Retaliation) and Diyat (ransom),* retrieved, february 4, 2014 from http://ahmadbahiej.blogspot.com/2008/11/memahami-keadilan-hukum-tuhan-dalam.html.

avoid such *hudūd*. In addition, the phrase *no one should grant forgiveness* also unfit because *hudūd* ordinance that related to the rights of God can be forgiven by repentance toward God (individual) and by doing good deeds and reconciliation (social). This attempt certainly does not ignore the victims' rights to justice.

To sum up, *hudūd* ordinance can be annulled by repentance toward God and reconciliation without neglecting the victims' rights to justice. This argument is in line with fiqh principle: *huququllahi mabniyatun ala al-musamahah wa huququ al-ibad mabniyatun* ala al-musyahha (asking repentance from God is more preferrable than that of human beings). This means that *hudūd* annulment related to the rights of God is easier than that of related to the rights of human. This could mean that asking repentance from *hudūd* adultery, theft, false accusation of illicit sex, drinking *khamar* and any types of *hudūd* that fall under the categories of the rights of God is easier than that of *had* of killing. One thing should be noted that all those easiness of asking repentance by no means neglecting the rights of the victim affected by those committing crimes.

3. Q*ishās* (Retaliation)

The word *qishās* derived from *qashasha-yaqushshu qashshan wa qashashan* which means "follow the trace". *Al-Qishās* or *al-Qashas* also means *al-mumatsalah* or balance or equal. Terminologically, *qishās* means infliction of similar act done by the perpetrator *(mujazatu al-jani bi mitstli fi'lihi).*[78] For example, Bani Israil applied *qishās* to whoever committed crimes against human's life that can be measured like killing, amputating limbs, eliminating limb function, attempting limb injury that can be measured. Thus, not all infringement of human's life is subject to *qishās*. In the Qur'an Qur'anic verse Al-Maidah 3:45 stated that:

78 Al-Zuhaili, *Al-Fiqh al-Islam, p.* 261

وَكَتَبْنَا عَلَيْهِمْ فِيهَا أَنَّ النَّفْسَ بِالنَّفْسِ وَالْعَيْنَ بِالْعَيْنِ
وَالْأَنْفَ بِالْأَنْفِ وَالْأُذُنَ بِالْأُذُنِ وَالسِّنَّ بِالسِّنِّ وَالْجُرُوحَ
قِصَاصٌ فَمَنْ تَصَدَّقَ بِهِ فَهُوَ كَفَّارَةٌ لَهُ

We ordained therein for them: 'life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.' But if anyone remit the retaliation by way of charity, it is an act of atonement for themselves. And if any fail to judge by (the light of) what Allah hath revealed, they are (no better than) wrongdoers.

The verse cited above shows that *qishās* is not originally the ordinance assigned by Islam, but was practiced by religions and great nations before the Qur'an was revealed. Muhammad teachings attempt to reduce the sanction of *qishās* only to the perpetrator not to the entire member of the clan, just like what was practiced in Jews' tradition. *Qishās* in Islam regulates the impliction in equal stand (the man for the man, the woman for the woman, the free for the free and the slave for the slave). In addition, Islam attempts to break way of the practice of killing among groups (clans) in a sophisticated way by giving opportunity to the perpetrator to ask for forgiveness and repentance to the victim's clan and compensate by paying *diyat* (financial compensation; blood money). The Qur'anQur'anic verse al-Baqarah, 2:178-179 stated:

يَا أَيُّهَا الَّذِينَ آَمَنُوا كُتِبَ عَلَيْكُمُ الْقِصَاصُ فِي الْقَتْلَى
الْحُرُّ بِالْحُرِّ وَالْعَبْدُ بِالْعَبْدِ وَالْأُنْثَى بِالْأُنْثَى فَمَنْ عُفِيَ لَهُ
مِنْ أَخِيهِ شَيْءٌ فَاتِّبَاعٌ بِالْمَعْرُوفِ وَأَدَاءٌ إِلَيْهِ بِإِحْسَانٍ
ذَلِكَ تَخْفِيفٌ مِنْ رَبِّكُمْ وَرَحْمَةٌ فَمَنِ اعْتَدَى بَعْدَ ذَلِكَ
فَلَهُ عَذَابٌ أَلِيمٌ(٨٧١) وَلَكُمْ فِي الْقِصَاصِ حَيَاةٌ يَا أُولِي
الْأَلْبَابِ لَعَلَّكُمْ تَتَّقُونَ (٩٧١)

O ye who believe! The law of equality is prescribed to you in cases of murder: the free for the free, the slave for the slave, the woman for the woman. But if any remission is made by the brother of the slain, then grant any reasonable demand, and compensate him with handsome gratitude; this is a concession and a Mercy from your Lord. After this whoever exeeds the limits shall be in grave penalty." In the law of equality, there is (saving of) Life to you, O ye men of understanding; that ye may restrain yourself.

The above mentioned verse used the word *katabna* (God has ordained) which means that *qishās* have to be applied. However, the last part of the verse suggested to forgive. This would means that *qishās* punishment can be avoided. Al-Thabari, the famous exegete, has an interesting opinion on this issue, he said:

والفرض الذي فرضَ الله علينا في القصاص، هو ما وصفتُ من ترك المجاوزة بالقصاص قَتلَ القاتل بقتيله إلى غيره، لا أنه وجب علينا القصاص فرضًا وجُوب فرضِ الصلاة والصيام، حتى لا يكون لنا تركه. ولو كان ذلِك فرضًا لا يجوز لنا تركه، لم يكن لقوله:»فَمن عُفي لهُ من أخيه شيء»، معنى مفهوم. لأنه لا عفو بعد القصاص فيقال:»فمن عفي له من أخيه شيء».

"The obligation to practice qishās as ordained by Allah should not be violated by murdering someone innocent. The obligation of qishās is different from that of praying and fasting, both of which should not be neglected. Al-Thabari argued that if this verse meant an obligation that should be applied strictly, then, God will not provide the rest of the phrase in this verse stated that "But if any remission is made by the brother of the slain..."which means no mercy for the murderer. Nevertheless, the phrase "but if any remission is made by the brother of the slain" means that qishās can be avoided by asking forgiveness.[79]

79 Muhammad Abu Ja'far ath-Thabari, *Jami al-Bayan fi Ta'wil Al-Qur'an*, (n.d.: Muassasah ar-Risalah, 2000), vol. 3, p. 357.

According to Al-Thabari, the important message from the verse is not about its strict application, but to practice it porpotionally without trespassing the limit. The example of trespassing the limit in *qishās* was the practice of *qishās* in Jahiliyya (period of ignorant) by slaying the entire member clan/ family of the perpetrator. This verse means that there is an alternative option in *qishās* that is forgiving as it is shown from the last part of the verse *takhfifun min rabbikum wa rahmah* (a concession and a mercy from your Lord).

A concession and mercy from God is far more important to be considered by the believers than retaliation to the perpetrators and their family and clan. The Qur'an provides choices for the victim's family in regard to *qishās* whether to retaliate or forgive. Giving forgiveness is encouraged and appreciated without ignoring the rights of the victim to claim justice. This could mean that legal proceeding continues while forgivenness have been given, to provide balance in the rights of the victim and the perpetrator.

4. Definition of Diyat

The word *diyat* (Arabic) derived from *ad-diyat* means "*ma yu'tha min al-mal badalan an-nafsi al-qatil* "(financial compensation paid to the victim's family in the cases of murder). Some Muslim scholars defined *diyat* as *al-malu al-wajibu bi sababi al-jinayah wa tu'adda ila al-majni alaihi au waliyyuhu* (financial compensation paid to the victim or the victim's heir for the crime committed namely: murders, amputations and injuries of body parts).[80]

Criminal offences that required to pay *diyat* are:

a. Intentional murder in the case that the kin of the victim forgave and asked for *diyat* payment. In this case, *diyat* is a replacement of *qishās*. This means that *qishās* may not be practiced. In addition, the implementation of *qishās* and *diyat* may be waived due to the unconditional forgivenness from the victim's family.[81]

80 Zakariya Al-Anshari, *Fathu al-Wahhab bi Syarhi Manhaji at-Thullab* (Bairut: Dar Al-Fikr, n.d.), vol.2, p. 137.

81 Al-Anshari, *Fathu al-Wahhab,* vol.2, p.136.

b. Unintentional murder, by accidence or like an accident (*al-qatlu al-khata au syibhu al-khata*).[82] In this case *diyat* means not as replacement of *qishās*, but an obligation that should be fulfilled because of the crimes, as stated above, committed by perpetrator who is not yet matured. For example is an unintentional killing committed by a child or an insane person.

c. Amputation, injury and removal of limbs.

During the Prophet Muhammad time, the amount of diyat for those who own the camel is equal to 100 camels, and for those who own the cattle is equal to 200 cows or 2000 sheeps. For those who own gold should pay equal to 1000 Dinar, for silver is equal to 12.000 Dirham, and for those who own jewelery should pay about 200 of the jewelery. During the Caliph of Umar bin Khattab, he waived the diyat payment of camel due to its high price.

Several ulama stated that the above mentioned regulation of *diyat* payment is meant for male only. *Diyat* payment for female is half of the above regulation. This opinion is based on the narration from Umar bin Khattab Ra, Ali bin Abi Thalib, and Ibnu Mas'ud Ra.[83]Actually, neither the Qur'an nor Hadith stated about different stipulation related to *diyat* payment for male and female. This ulama's opinion on the different between the *diyat* payment for male and female was based on *qiyas* (analogy) of the Qur'anic verses related to witnesses and inheritances which stipulate the differences between male and female.

82 There are three types of removing human's life in *fiqh* namely:[1] intentional (*al-amdu*), [2] semi intentional (*syibhu al-amdi*), and [3] by mistake (*al-khata'*). Intentional murder happens when someone kill the victim using weapon that could kill; semi intention murder happens when someone kills the victim by using weapon that usually not used for killing such as piercing needle on body parts that would not kill; and murder by mistake happens when someone mistakenly kill someone else, like when one intends to shutt the bird but by mistake the person hits someone else and cause the person's death. The last two types of killing do not subject to *qishās* but for *diyat. Qishās* only apply to the first type of killing. Al-Anshari, *Fathu al-Wahhab,* vol.2, p.126.

83 Sayyid Sabiq, *Fiqh as-Sunnah* (Bairut: Dar al-Fikr, n.d.), vol. 2, p. 476.

Several ulama stated that the Prophets' companion Zaid bin Tsabit and the Tabiin Said bin al-Musayyab argued that *diyat* payment for male and female is the same.[84] In *al-Muwattha*, Imam Malik narrated from al-Baihaqi from Rabi'ah bin Abdurahman, he asked: "I asked Sayyid bin Musayyab about *diyat* for female of cutting a finger, and he said 10 camels (the same amount for male who did the same). How about cutting two fingers? She should pay 20 camels, for three fingers is 30 camels and for four fingers is 40 camels." Then Said bin Musayyab asked him back: "Are you an Iraqi." And Abdurrahman answered, "I am a learned man who want to seek knowledge." Said said: "This is part of sunnah of the Prophet."[85]

From the above mentioned narration, it is stated that *diyat* payment for male and female is the same. However, this opinion is unpopular and even rejected by the majority of ulama. In fact, the opinion of Zaid bin Thabit and Said bin Musayyab should be taken into consideration as they were the companion of the Prophet and the Tabiin. Their opinion is in line with the Qur'anic verse An-Nisa, 4:92 which stated that *diyat* for male and female is the same.

وَمَا كَانَ لِمُؤْمِنٍ أَنْ يَقْتُلَ مُؤْمِنًا إِلَّا خَطَأً وَمَنْ قَتَلَ مُؤْمِنًا خَطَأً فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَدِيَةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ إِلَّا أَنْ يَصَّدَّقُوا فَإِنْ كَانَ مِنْ قَوْمٍ عَدُوٍّ لَكُمْ وَهُوَ مُؤْمِنٌ فَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ وَإِنْ كَانَ مِنْ قَوْمٍ بَيْنَكُمْ وَبَيْنَهُمْ مِيثَاقٌ فَدِيَةٌ مُسَلَّمَةٌ إِلَى أَهْلِهِ وَتَحْرِيرُ رَقَبَةٍ مُؤْمِنَةٍ فَمَنْ لَمْ يَجِدْ فَصِيَامُ شَهْرَيْنِ مُتَتَابِعَيْنِ تَوْبَةً مِنَ اللَّهِ وَكَانَ اللَّهُ عَلِيمًا حَكِيمًا (٢٩) وَمَنْ يَقْتُلْ مُؤْمِنًا مُتَعَمِّدًا فَجَزَاؤُهُ جَهَنَّمُ خَالِدًا فِيهَا وَغَضِبَ اللَّهُ عَلَيْهِ وَلَعَنَهُ وَأَعَدَّ لَهُ عَذَابًا عَظِيمًا (٣٩)

84 Sabiq, *Fiqh as-Sunnah,* vol. 2, p. 476

85 Sabiq; *Fiqh as-Sunnah,* vol.2, p. 476.

Never should a believer kill a believer, but (if it so happens) by mistake, (compensation is due): if one (so) kills believer, it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you, and he was a believer, the freeing of a believing slave (is enough). If he belonged to a people with whom ye have treaty of mutual alliance, compensation should be paid to his family, and a believing slave be freed. For those who find this beyond their means, (is prescribed) a fast for two months running: by way of repentance to Allah: for Allah hath all knowledge and all wisdom. If a man kills a believer intentionally, his recompense is Hell, to abide therein (for ever): and the wrath and the curse of Allah are upon him, and a dreadful penalty is prepared for him (Qur'anic verse Al-Nisa: 92-93).

The verses above do not differentiate between *diyat* payment for male and female. In the meantime, the narrations related to differencies between male and female in *diyat* payment are still questionable in term of its authenticity.

5. Definition of *Ta'zier* (Discretionary punishment)

Ta'zier means punishment for immoral behaviour or crimes that is not regulated in the Qur'an or Sunnah. Categories of punishment are administered by the discretion of nation state under judge or (Imam). The nation state is responsible to regulate categories or types of punishment to prevent of the recurrent of crimes to create social welfare.

Immoral behaviour refers to committing acts or saying which are prohibited under religious teaching, or fail to perform religious duties. Jurists categorise the immoral behaviour under three types: *first*, immoral behaviour that is punished under *had*, like *jarimah hudūd*, *qishās* and *diyat*; *second*, immoral behaviour that is punished by *kafarat* (expiation), such as having sex while fasting, *dzihar*, unintended murder and many others. *Third*, immoral behaviour that is not regulated under *hudūd* or *kafarat*. The third type of immoral behaviour is subject to be imposed by discretion of judge.

The objective of discretional punishment is to create a social welfare through justice, security and wellbeing. The establishment of punishment aims to create a harmonious community. Social stability may be ruined if theft,

robbery, murder, and prostitution occured in that society. Islam stipulated different types of punishment to prevent disruption of social harmony among the members of the community, and create social stability and security.

Thus, the punishment is a way (*wasail*), not an objectives (*maqasid*), to create social welfare, and it is flexible in nature and elastic (*ghoiro thubuth*), while its objective is static. Qur'anic verses and hadith about *qishās* and *hudūd* is clear occurance (*qath'iy*), nevertheless, to implement those texts are considered supposition (*zhanny*) because of many contextual differences such as social, cultural and economic contexts.

One important aspect to be considered in implementing the punishment is social context. The Prophet's companion, Umar ibn Khattab, refused to implement *qishās* for the thief (amputed the thief's hands) and offered to pay *diyat* instead which was lower and lighter than the stated punishment. Umar consideration on this matter was based on the social condition at that time when famine stroke the nation and it was unsuitable to implement punishment of amputation of limb.[86] Narrated the Prophet Muhammad: "*la qath'a fi maja'ati muhtharrin/* no amputation of limb for punishment in the forced or desperate condition because of economic hardship". Thus, in implementing the punishment, social and economic condition should be taken into consideration besides the strict regulation stated and stipulated by ulama like the case of Umar sated above; otherwise, its objective to make social welfare is unfulfilled.

The above mentioned explanation informs us that there are choices to be considered in implementing the punishment and *hudūd* or *qishās* should be the last option offerred or implemented. Muhammad Iqbal Shiddiq categorised Islamic Criminal Law into four, namely: (1) punishment is given as the last resort when there is no other option available; (2) punishment as a learning process; (3) punisment as a reformative attempt; (4) punishment as retributive process. [87]

86 Audah, *At-Tasyri' al-Jina'i,* vol. 2, p. 540.

87 Rifyal Ka'bah, *Pidana Islam Sebagai Pelaksanaan Syariat Islam di Aceh (Islamic Criminal Law and its Implementation in Aceh), p*. 12 retrieved from http://islamic-law-in-indonesia.blogspot.com/2010/02/pidana-islam-sebagai-pelaksanaan.html on 3 of February 2015

B. The History of *Hudūd*

Hudūd, a long with *qishās* and *diyat*, has been practiced long before the arrival of Islam. Hinduism, Jews, Christianity and many great nations like Greek and Persia implemented these types of punishment which nowadays considered as cruel and inhuman, such as in the case of *qishās* and *rajm* (stoning to death).

Qishās has been practised since the Prophet Moses and written in Exodus: 21 as cited by Sayyid Sabiq in Fiqh as-Sunnah[88]:

أن من ضرب إنسانا فمات فليقتل قتلا، وإذا بغى رجل على آخر فقتله اغتيالا فمن قدام مذبحي تأخذه ليقتل، ومن ضرب أباه وأمه يقتل قتلا، وإن حصلت أذية فأعط نفسا بنفس، وعينا بعين، وسنا بسن، ويدا بيد، ورجلا برجل، وجرحا بجرح، ورضا برض

Whoever strikes someone a mortal blow must be put to death.However, regarding the one who did not hunt another down, but God caused death to happen by his hand, I will set apart for you a place to which that one may flee.Whoever strikes father or mother shall be put to death.But if injury ensues, you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot,burn for burn, wound for wound, stripe for stripe.

The law of stoning also has been practised in Moses era as it is stated in Leviticus chapter 20: 10-20 mentioned that someone who commits adultery shall be put to death. It is also stated in Deuteuronomy 22:22-24 saying that "if a man and a woman commit adultery shall pelt them with stones, and shall they die." In the mean time, an opinion has said that in Jesus (Isa) era there was no *qishās* as a way of punishment but paying *diyat*.[89] It is

88 Sabiq, *Fiqh as-Sunnah,* vol.2, p. 341.

89 The word *diyat* (singular), *diyaat* (plural) is a verb word from the word *wadza* means "financial payment to compensate the life who has been murdered or to compensate the lost of the limbs". Luis Ma'luf, *Al-Munjid fi al-Lughah wa al-'Alam* (Beirut: Dar al-Masyriq, 1986), p. 631.

mentioned in the Bible Matthew 5: 39-42 as follow[90]:

لا تقاوموا الشر، بل من لطمك على خدك الايمن
فحول له خدك الآخر أيضا.ومن رأى أن يخاصمك
ويأخذ ثوبك فاترك له الرداء أيضا، ومن سخرك ميلا
واحدا فاذهب معه اثنين.

But I tell you, do not resist an evil person. If anyone slaps you on the right cheek, turn to them the other cheek also. 40 And if anyone wants to sue you and take your shirt, hand over your coat as well. 41 If anyone forces you to go one mile, go with them two miles. 42

Death penalty and stoning also can be found in the Bible John 8: 3-5 stated that someone who commits adultery should be stone to death. Xavier Leon-Dufoun stated in his book *Dictionary of New Testament* that adultery is illicit sexual relationships between a married man and a married woman. It is forbidden according to the law because it violates the rights of husband toward his wife. The penalty for this illicit behaviour is stoning to death for both of the perpetrator by the community for their breaching and disgracing the whole community.[91]

The above mentioned explanation shows that *qishās*, *rajam* and *diyat* have been practiced by previous revealed religions before Islam. There were various modes of application concerning these laws on the grounds and in different contexts. Some of their application might violate human dignity and discrimination occured between privileged groups over the inferior in the community.

Before the arrival of Islam, injustice occured regularly in the implementation of law. According to Al-Thabari, in Jahiliyya periode when a slave killed a free man, the victim's family did not punish the perpetrator,

90 Sabiq,*Fiqh as-Sunnah,* vol.2, p. 341.

91 XavierLeon-Dufour, *Ensiklopedi Perjanjian Baru(Dictionary of New Testament)* (Yogya: Kanisius, n.d.), p.613.

instead, they asked the owner of the slave to be punished by *qishās*. In addtition, if a woman killed a man, the victim's family did not demand to punish the woman herself but to asked the male member of the perpetrator to be punished by *qishās*. In Jahiliyya periode, unjust practices of *qishās* and *diyat* often occured such as in the case of Bani Nadhir who claimed to be the highest clan over the others. If the member of this clan committed crime (killing someone from other clan), *qishās* was not implemented, but to pay *diyat* instead. Besides, the amount of *diyat* is half of the *diyat* regulated for other clan.[92]

Consequently, *qishās* that was practised in Jahiliyya periode violated the right of human dignity because they implemented *qishās* to innocent person. Islam came to eliminate unjust, discriminative and humiliating practices of *qishās*, *rajam* and *diyat* that violated human's dignity in Jahiliyya periode. This is the spirit of Islam in seeing all those punishments which aim to eradicate all these practices.

Islam, as the last revealed religion, aims to mediate between the extreme justice of Torah and the extreme generousity of Bible; between the rigidity of Jews legal formal and the Christian pouring of loving grace; and between the violent doctrines of Torah and the softness doctrines of Bible. Islam combined both sides of doctrines of Jews and Christian as mentioned in the Qur'anic verse Al-Baqarah 143: "Thus have We made you an *ummah* justly balanced, that ye might be witnesss over nations..."

The rigidity of Jews' doctrines that lead to severity, in fact, was a result of their experiences along history. The Jews is a decended of Jacob who were living under an otoritarian and oppressive Pharaoh. Experiencing oppressions for long time has made the Jews to have low spirit to live and fight. Thus, God revealed the tough doctrines to awaken their spirit of life and claim their human dignity. Unfortunately, these tough doctrines have made the Jews became harsh and abusive toward others.

Along came the Christianity through God's messenger Isa al-Masih (Jesus) who taught its doctrines of modesty, affection, patience, and

92 Al-Thabari, *Jami'u al-Bayan*, vol. 3, p. 357.

fortitude. In addition, Christian doctrines eliminate any kinds of violence and harshness of the Jews. However, because of its softness has resulted in neglecting assertive law enforcement.

Islam arrived through the Prophet Muhammad spreading the moderate teaching of its doctrines to mediate between the harshness and the softness. The Qur'an accommodate the law from Torah especially in the case of fair law enforcement in *qishās*. Qur'anic verse Al-Maidah: 45 stated: "We ordained therein for them:'Life for life, eye for eye, nose for nose, ear for ear, tooth for tooth, and wounds equal for equal.'..." Similar regulation can also be found in Exodus 21: 23-25 saying: "But if there is serious injury, you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise"

In Islam, however, apart from enforcing the law for justice, it allows an opportunity for repentance. Qur'anic verse Al-Maidah further stated: "...But if anyone remits the retaliation by way of charity, it is an act of atonement for himself. And if any fail to judge by (the light of) what Allah hath revealed, they are (no better than) wrongdoers."

Justice and gracefulness should always come together; justice without gracefulness could end up in injustice. Gracefulness without justice would make human in continous guilt. In every verse of the Qur'an related to *qishās* and *hudūd*, always being concluded with the chance of forgiveness and repentance as a way to protect human dignity.

C. Hudūd as Part of *Syari`ah*, Not the Whole of It

What is Islam? That is a simple short question. However, the answer might differ from one into another. These differences are as a result of the wide scope of the term that include many aspects of human's life and needs and related to the essence of it. In several Qur'anic interpretation books, the term Islam contains at least 20 meanings, namely: *din al-haqqi, dinullahi, din al-adl, din al-i'tidal, din as-silmi, din as-salam, din al-musalamah, din al-musawah, din al-muwasatu, din al-karamah, din al-insaniyah, din al-hurriyah, din al-fithrah, din al-qayyimah,dinun mardiyun, dinu jami'i al-ambiya'i, din al-aqidah, din al-ibadah, din al-mu'amalah,* and many others.

The different meaning of Islam can be seen from different perspectives, for example, when Islam is defined as *din al-insaniyyah,* it means that Islam is intended for all human being. When Islam is defined as *din al-Islam, wa as-silmi, wa al-musalamah,* it means that Islam aims for peacefulness. In the mean time, when Islam is defined as *din al-adl wa al-i'tidal,* it means that Islam aims at spreading justice and equality amongst human.

Ethimologically, the term Islam is a verbal noun (*mashdar*) of *aslama* which means surrender or to submit body and soul sincerely as indicated by the following verses of the Qur'an (Qur'anic verse al-Baqarah, 2: 131, 133, Ali Imran, 3:19, 67,84 an-Nisa, 4: 125). Other opinion stated that the word Islam originated from verb word *sa-li-ma* with its derrivation contains *as-salam* (prosperity), *as-silmu* (peace), and *as-salamah* (safety). Thus, Islam can be defined as submission of body and soul towards God sincerely to get prosperity, peace, and safety in life. There is no definition of Islam spesificily in the Qur'an.The Qur'an only stated that Islam is the only religion accepted by God. The companions of the Prophet Muhammad also have asked him several times about what Islam is, however, the Prophet's answer was related to the funcion of Islam not definition or ideology. In one occasion, the Prophet stated that Islam is the witness and acceptance that there is no God but Allah and Muhammad is His Messenger; performing prayers five times a day, giving alms, fasting at Ramadhan month, and performing pilgrimage to the Baitullah. In some other times, the Prophet said that Islam is saying the wisewords and doing charity. Islam is surrender towards God wholeheartedly by ensuring not to hurt other's feeling through saying or deed. Islam is providing safe circumstances to others. Islam is a transformation from an evil deed, a religion that teaches moderate and tolerant doctrines (*al-hanafiyatu as-samhah).*

Terminologically, Islam is a name of an enhanced religion revealed from God to the Prophet Muhammad with the Qur'an and Sunnah as its main sources. Mahmud Shaltut defined Islam as God's religion whose messages revealed to the Prophet Muhammad to be delivered to all human being.[93]

93 Mahmud Salthut, *Al-Islam: Aqidatun wa Syari'atun* (Kairo: Dar asy-Syuruq, 2001), p. 9.

There have been many Muslim scholars who have defined Islam. However, there still no one who could give satisfied definition of it because of the wide range of its dimensions.[94]

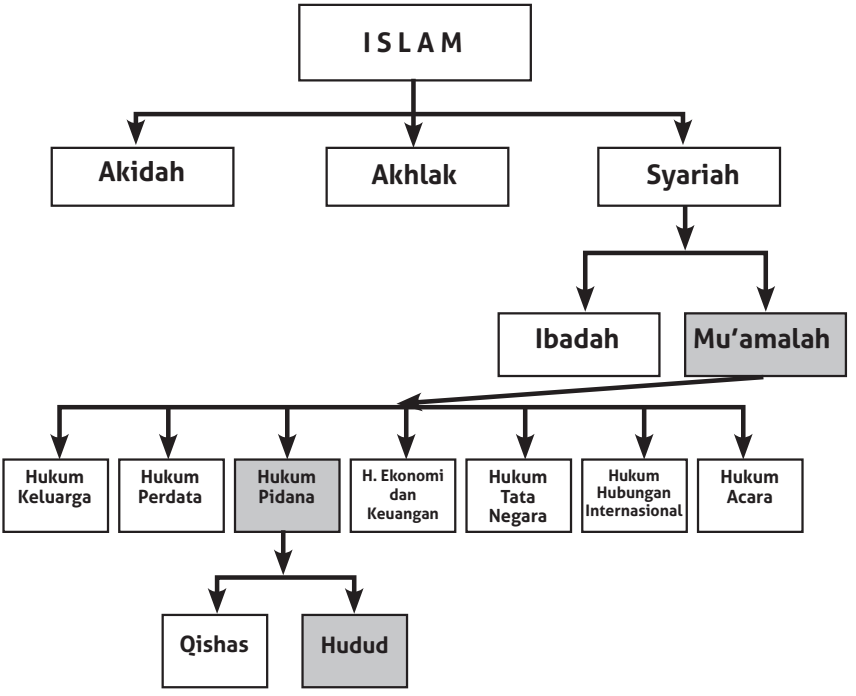
As explained before, Islamic teachings contain three aspects, namely: *tawhid* (*al-ahkam al-i'tiqadiyah*) related to the belief system; moral values (*al-ahkam al-khuluqiyah*) related to good and bad deeds; practical relations (*al-ahkam al-'amaliyah)* related to social relationships.[95] These three aspects, according to Abdul Wahhab Khallaf, are called the *Fiqh* of the Qur'an. Thus, the essence of the Qur'an is represented by these three categories. The social relations prescribed almost every aspect of life that include charity, fighting in the name of Allah to eliminate injustice and to protect women, children, and the weak, feeding the orphans, helping and ensuring safety for others, and many others related to social relationships.

Jinayah which contains *hudūd, qishās, diyat* and *ta'zir* aims at creating justice and balance is in fact only a small part of Islamic teachings. Islam covers all God's teachings revealed to Muhammad as chosen Prophet which its main purposes is to enhance the previous prophets before Him in term of faith, worship, moral and social interactions.

94 Abdul Karim Zaidan, *Ushul ad-Da'wah* (Bagdad: Maktabah al-Qudsiyah, 1987), p. 9-13.

95 Abdul Wahab Khalaf, *Ilmu Ushul al-Fiqh* (Mesir: Dar al-Ilmi, 1978), p. 32-33.

For more detail see the following figure:[96]



The majority of ulama stated that the objectives of *hudūd* and *qishās* are to provide justice to anyone whose rights are violated. *Qishās* in the Qur'an is stated in the following verses: al-Baqarah, 2:178, 179, 194, an-Nisa, 4:92, al-Maidah/5: 32 and 45. According to al-Thabari, the provision of *qishās* are similar to any other provision stated in the Qur'an like prayer and fasting, but it should be implemented proportionally.[97]

The Qur'anic verses which becomes the basis for *qishās* are as follows: (1) Al-Maidah, 5:32,45: explains about *qishās* of life as it was also written in Torah for Israelites; (2) Al-Baqarah, 2: 178, 179, 194: justify about the

96 This figure draws the position of *hudūd* in the development of Classical Islamic Law (fiqh) that usually referred to in the implementation of Islamic Criminal Law in modern era. In fact, its relevance for the current era is unfit with modern development of Islamic Law.

97 Al-Thabari, *Jami'u al-Bayan,* vol. 3, p. 357.

practice of *qishās* occured between the clan and the possibility for forgiveness and paying *diyat*; (3) An-Nisa, 4:92: clarifies about *qishās* for individual murder which specifies into:

a. Unintented murder of a Muslim: freeing a believer slave and paying *diyat* to the victim's family unless the heirs let the *diyat* not to be paid
b. Murder of a Muslim who is considered an enemy: freeing a believer slave.
c. Murder of an unbeliever who is under peace agreement: paying *diyat* to the victim's family and freeing a believer slave or fasting for two months continuously.

Several hadiths which are used as a bases for *hudūd* implementation are:

عَنْ أَبِي هُرَيْرَةَ رَضِيَ اللَّهُ عَنْهُ عَنْ النَّبِيِّ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ: حَدٌّ يُعْمَلُ بِهِ فِي الْأَرْضِ خَيْرٌ لِأَهْلِ الْأَرْضِ مِنْ أَنْ يُمْطَرُوا أَرْبَعِينَ صَبَاحًا

Narrated Abu Hurairah from the Prophet Muhammad said: "Implementing hudūd is better than raining for 40 days in the morning ."(Ibnu Majah) [98]

أَيُّهَا النَّاسُ إِنَّمَا هَلَكَ الَّذِينَ مِنْ قَبْلِكُمْ أَنَّهُ كَانُوا إِذَا سَرَقَ فِيهِمْ الشَّرِيفُ تَرَكُوهُ، وَإِذَا سَرَقَ فِيهِمْ الضَّعِيفُ أَقَامُوا الْحَدَّ عَلَيْهِ

"O people, those who have gone before you were destroyed, because if any one of high rank committed theft amongst them, they spared him; and if anyone of low rank committed theft, they inflicted the prescribed punishment upon him."[99] (Muslim)

98 Ibn Majah Muhammad, *Sunan Ibn Majah* (Beirut: Dar Al-Kutub Al-Ilmiyah, n.d.), vol.2, p. 848.

99 Muslim, *Shahih Muslim,*vol.3, p. 1315

عن علي رضي الله عنه قال: قال رسول الله صلّى الله عليه وسلم: أقيموا الحدود على ما ملكت أيمانكم، من أحصن ومن لم يحصن

"O people, impose the prescribed punishment upon your slaves, those who are married and those who are not married,..."(Muslim) [100]

Never has the Qur'an uses the word *hudūd* just like the *fiqh* jurist defined. The word *hudūd* stated 13 times in the Qur'an in eight different chapters as follows: one verse in al-Baqarah 2: 187 about the prohibition of having sex with a wife while doing *i'tikaf* (seclusion at mosque for worship)- four verses in al-Baqarah 2: 229 related to Allah's provision concerning husband-wife regultions on divorce; stated twice on the verse al-Baqarah 2: 230 on *thalaq bain* (irrevocable divorce). It is also written in the Qur'anic verse an-Nisa, 4:13: on inheritance, and in the Qur'anic verse an-Nisa, 4:14: on the detail explanation of inheritance. Another verse on *hudūd* is available in the Qur'anic verse at-Taubah, 9: 97 related to Badawi clan (nomadic tribe) who did not accept Islam as their religion and stayed astray during Qur'anic revelation. Qur'anic verse al-Mujadilah, 58:4 explains about the law of *dzihar* (an insult proffered by a husband upon his wife that his wife is like the back of his mother) as another form of divorce in Jahiliyya period. In at-Ṭhalaq, 65:1 it is related to the regulation of divorce and rights to be fulfilled after divorce.

From the above explanation, the term *hudūd* in the Qur'an means the punishment other than criminal punishments (*jinayah* and *jarimah*). It differs significantly from Jurist opinion and definition of *hudūd* that aims for ruling criminal punishment for the perpetrator. In this case, the term *hudūd* is based on the following hadith:

'A'isha, the wife of Allah's Apostle (may peace be upon him), reported that the Quraish were concerned about the woman who had committed theft during

100 Muslim,*Shahih Muslim,* vol.3, p. 1330.

the life time of Allah's Apostle (may peace be upon him), in the expedition of Victory (of Mecca). They said: "Who would speak to Allah's Messenger (may peace be upon him) about her?" They (again) said: "Who can dare do this but Usama b Zaid, the loved one of Allah's Messenger (may peace be upon him)? She was brought to Allah's Messenger (may peace be upon him) and Usama b. Zaid spoke about her to him (interceded on her behalf). The colour of the face of Allah's Messenger (may peace be upon him) changed, and he said: Do you intercede in one of the prescribed punishments of Allah? He (Usama) said: 'Messenger of Allah, seek forgiveness for me. When it was dusk. Allah's Messenger (may peace be upon him) stood up and gave an address. He (first) glorified Allah as He deserves, and then said: Now to our topic. This (injustice) destroyed those before you that when any one of (high) rank committed theft among them, they spared him, and when any weak one among them committed theft, they inflicted the prescribed punishment upon him. By Him in Whose Hand is my life, even if Fatima, the daughter of Muhammad were to commit theft, I would have cut off her hand. He (the Holy Prophet) then commanded about that woman who had committed theft, and her hand was cut off. 'A'isha (further) said: Hers was a good respentance, and she later on married and used to come to me after that, and I conveyed her needs (and problems) to Allah's Messenger (may peace be upon him). (Muslim).

Islamic Syari`ah which centered on three aspects as explained before (*tawhid*, moral and social relations) covered not only theological doctrines but also social interactions like everyday life relationships and needs in reality.[101] Islamic teachings aim at giving guidance on religious doctrines as well as social welfare. Providing food for the hunger, finding jobs for the unempoyed, regulating fair payment for employees, creating good economic condition for the people in need are to name a few which are included in Islamic Syari`ah.

101 Manna Khalil al-Qatthan, *Wujub Tahkim asy-Syariah al-Islamiyyah* (Beirut: Mu'assasah ar-Risalah, 1985), p. 9.

In the state level, implementing the Syari`ah is an ideal model to create good nations. However, as we can see that there are violations on the implementation of these teachings in everyday life. For example, in Indonesia and in other contexts, currency is used for economic transaction, however, manytimes it is used as a commodity to get usury in economic transaction. The Qur'an stated clearly about the prohibition to take usury. Other example is related to natural resources like in Indonesia. There are many of them, however, because of its mismanagement which is not pro-people's interest has resulted in an exploitatively belongs to elites. In fact, Syari`ah prescribed that forests and mineral are belong to the people and their advantages should be taken for people's welfare, not individual. Thus, poverty eradication and increasing education participation are part of Syari`ah implementation. Unfortunately, the term Syari`ah today is more focus on the implementation of *hudūd* and *qishās* as the true Syari`ah than any other aspects of Syari`ah related to people's welfare explained above.

In relation to criminal law, many people obsessed with implementing *hudūd* and *qishās* as an Islamic identity. Nevertheless, when we talk in a state context, *hudūd* is only a small part of Syari`ah, and we can not say that Syari`ah means implementing *hudūd*. There is a bigger picture than just *hudūd* in Syari`ah such as developing social, economic, politics, and other community welfare which are also important aspect of Syari`ah. *Hudūd* implementation should be regarded with the consideration of morality to provide justice and harmony. For example, the implementation of cutting hand for thief is incongruent when the state does not provide enough employment opportunity to give every family sufficient food to eat.

There are only a small number of verses related to criminal law compared to verses related to justice, equal rights, repentance, theology and many others. Besides, the punishment is applied only for the perpetrator whose number is small compare to the majority of decent people in the community. Thus, it is unfair if the main concern of Islamic state concentrated on *hudūd* implementation, because *hudūd* is only one aspect apart from many other aspects covered by Islam as a religion.

The main responsibility for nation state is not to implement criminal law but to create national stability, justice, and security for all. The Chaliph Umar bin Abdul Aziz was very humbe and wise ruler. Once his wife found him weeping after prayers, she asked him what was happened, he replied

> "I have been chosen to become the ruler over Muslims and I was thinking of the poor who are starving, and the sick who are destitute, unclad who are distressed and oppressed that are stricken and the stranger that is in prison, and the venerable elder, and those who have large family and small means and many others like them in these countries of the earth and the distance provinces, I felt that my Lord would ask me about them on the day of resurrection, and I feared that no defense would avail me and wept."[102]

The above Umar bin Abdul Aziz's statement showed his responsibility as the leader of the nation in accordance with Islamic Syari`ah, that was ensuring no one left behind by giving all their rights and eliminate injustice amongst them. The ruler is responsible to spread virtuous values, enhance justice, provide the need of the community, to be trustworthy and to protect the nation from any danger.

When Muhammad bin Ka'ab al-Quradzi was asked by Umar bin Abdul Aziz to tell aboutgovernmental justice, he said:

> Be a father of a young adult, a child for an old man, a brother for a peer and be it for the women. Give punishment in accordance with the guilt and level of capability. Avoid violence otherwise you become a transgressor.[103]

102 Adz Dzahabi, *Tarikh Al Islam wa Wafayat Al Masyahir wa Al A'lam*(Beirut: Dar al-Kitab al-Arabi, 1407 H.), vol.7, p. 197.

103 Ibn Muflih, *al-Adab Asy-Syar'iyyah* (Beirut: Muassasah ar- Risalah, 1417 H.), vol. 1, p. 202.

The above mentioned advice from Umar bin Abdul Azis showed an ideal implementation of Syari`ah in Islam. Qur'anic verses on *hudūd* and *qishās* were revealed in the second half of Muhammad resided in Madinan period.[104] Take an example of the Qur'anic verse An-Nur which was revealed mostly related to social behaviour and etiquettes. There are 18 laws contained in this Chapter related to social relationships on how to build harmony by practicing good behaviour and avoiding bad behaviour that can destroy social harmony like *zina*, prostitusion and *qadzaf* (false accusation on illicit sex).

Chapter Al-Maidah, where discussed about *had* for thief, was the last verse revealed of the Qur'an. Thus, the majority of jurist agreed that the law should be implemented efectively because there is no other verse would abrogate it. However, at that time, the condition of Muslim community has reached the peak of progress in social, economic and politics. These are the reason why the verses of *juziyyah* (particular objectives) like *hudūd* and *qishās* were revealed when stability of the nation has been reached. Thus, the first responsibility to build a nation is to ensure the development of social, economic and political stability and then regulating the law on possible offences.

The verse of *qishās* stated in the Qur'an (al-Baqarah) was revealed in the first year of Muhammad migration to Medina related to the case of the Jews who asked the Prophet to be the mediator between them. The case of *qishās* in Islamic history was recorded at the 8th year of the migration when a man from Bani Laith murdered a man from Bani Huzdail.[105] This case informed that *qishās* was implemented in the last part of Muhammad's period in Medina.

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104 Qur'anic verse al-Maidah/5: 33: Muharabah, al-Maidah/5:38: punishment for thief (hands amputation), al-Maidah/5: 45: hukuman Qishās , al-Maidah/5: 90: prohibition of drinkingintoxication and worshiping idols (*riddah*), an-Nur/24: 2: *zina* punishment for unmarried, an-Nur/24:4: *Qadzaf* punishment (false accusation of illicit sex), an-Nisa/4:15: *zina* punishment for married offender (seclusion at home), al-Hujurat/49: 9: punishment for rebellion.

105 Muhammad Thahir Ibn Asyur, *at-Tahrir wa An-Tanwir* (Tunisia: Ad-Dar At-Tunisiyah, 1984), vol. 2, p.137.

The historical fact stated above explained that *qishās* was not implemented until the stability of social and economic achieved. The implementation of *hudūd* and *qishās* without considering all those matters will only create injustice. Is it fair to punish the student of boarding school, for example, who is late for school, while there are 1000 students and there only 30 bathrooms in the boarding? Or is it fair to punish a thief in the situation of economic crisis when there are food scarcity to feed the family in the unstable and corrupt political situation?

Yusuf al-Qaradlawi, a famous ulama, supported a Syari`ah-based nation that aims at providing social welfare. *Hudūd* and *qishās* should not be implemented unless the nation has reached social, economic and political stability. The Syari`ah based nation should not focus on implementing *hudūd* while the community has not practice Islamic virtuos in their life.[106]

The implementation of *zina* law for example should be first ensuring easiness of registering for marrige, moderate payment of brideprice, availability of housing for newly wed, supportive administrative procedures, and many others. In the mean time, the government should also ensure to reduce *zina* by closing the path that lead to *zina* like controling places that usually become a transaction of prostitutes, protecting internet access from pornography.

Thus, the objectives of *zina* law is to ensure that the community behaving in accordance to Islamic teachings of social behaviour and etiquettes. These virtuous include: asking permission before entering the house, guarding chastity, dress up politely, and wearing the jewelerly wisely.[107] Thus, *zina* law is about supportive administrative procedures for marriage and the closure of *zina* accessability.

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106 Yusuf al-Qaradlawi, *Syariah al-Islam Shalihah li at-Tathbiq fi Kuli Zaman wa Makan* (Kairo:Dar ash-Shahwah,1993), p.139.

107 Qur'anic verse An-Nur/24: 27, 30, 31. Ibnu Jarir narrated a story that Qur'anic verse An-Nur/24:27 was revealed in the case of a woman from Anshar (The helper) asked the Prophet: "O The Messenger of Allah, I was at my house and I was at a condition that uncomfortable to be seen by anyone including my child and my father. However, they keep bothering me that way."

From the above explanation, *zina* law is not the aims but to ensure the avoidance of the act of *zina*. This also can be seen from the requirements of *zina* law (the presence of four witnesses) which are difficult to provide.[108]

Likewise, in the case of *had* for thief, the government should create economic stability so every member could feed the family adequately. Amputation law for thief should not be implemented untill the government guarantee the prosperity of the people. *Had* for thief stated only once in the Qur'an connected with the verses on the obligation to *zakat* (alms giving) which are stated 57 times in the Qur'an. In addition, the verse on *had* for thief is connected with the obligation of charity, feeding the indigent, and the prohibition of being miserly and greedy. The objective of *had* for thief is not on the amputation itself but to create prosperious community and respect each other in the community just like exemplified by the Prophet Muhammad and his companions.

The Prophet and his companions are the ideal role model in this context. Furthermore, their care for others in many cases more than their care for themselves. There are several hadith reported on their best relationships in caring other people which exceptionally inspiring which usually called as *ithar*. During the Prophet era, the poor were worried free from any kinds of exploitation by the rich. The rich amongst them realised that within their wealth there were the rights of others by sharing them through charity.

Long before the revelation of *hudūd* verses, the Qur'an revealed many verses related to caring and sharing with others. Most of these verses were revealed in Meccan period. In addition, there were also verses advised to do justice and avoid oppression towards others.

The above explanation showed that *had* for thief should not be implemented until the state guarantee prosperity and welbeing for all. When the people are prosperous, but stealing was still occured that could mean the

108 Muhammad Syahrial Razali Ibrahim, *Al-Qur'an dan Keadilan Islam dalam Pensyariatan Hudūd (The Qur'an and Islamic Justice in Hudūd Sharia),* (Malaysia: Jurnal Media Syariah, International Islamic University Malaysia (IIUM), vol. XIV No. 1, January-June 2012), p. 20.

thief is greedy of wanting more and deserved punishment.[109]

The prophet recommended that the perpetrator should feel sorry for what have been done. They should hide their unaccepted behaviour and they should aimed at asking repentance. Regreting for what have been done is better than declaring bad behaviour.[110] The Prophet also suggested the victim to forgive and reconsile:

عَنْ عَبْدِ اللَّهِ بْنِ عَمْرِو بْنِ الْعَاصِ أَنَّ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ قَالَ تَعَافَّوا الْحُدُودَ فِيمَا بَيْنَكُمْ فَمَا بَلَغَنِي مِنْ حَدٍّ فَقَدْ وَجَبَ

Narrated Abdullah bin Amru bin Ash, the Prophet said: Forgive the imfliction of prescribed penalties among yourselves, for any prescribed penalty of which I hear must be carried out. (HR. Abu Dawud dan an-Nasa'i)[111]

Based on the hadith above, if the case has been lodged to the court, no chance for the case to be withdrawn. However, how can the perpetrator asked for forgiveness to the victim while in the condition of anger? According to syekh Mahmud Muhammad, an al-Azhar ulama, when the thief was caught, the community should give advice to return to good behaviour and returned the stolen goods to where it belongs. The thief can also negotiate to avoid the court. This is how Islam prescribed the social relations by concealing other people's disgrace because by doing this it is believed that God will conceale their disgrace in the hereafter. Besides, God will forgive the victim in the afterlife who is willingly forgive the perpetrator for their misconduct.[112] This attempt has given two advantages: the return of stolen wealth and the repentance of the wrongdoer without necessarily courted and amputated the

109 Muhammad Syahrial, *Al-Qur'an dan Keadilan Islam,* p. 21-22.

110 Yusuf ibn Abd al-Barr,*Al-Istidzkar* (Beirut:Dar al-Kutub al-Ilmiyah, 2000), vol.7, p. 466.

111 Abu Dawud Sulaiman bin al-Asy'ats as-Sijistani, *Sunan Abi Dawud* (Beirut: al-Maktabah al-'Ashriyyah, n.d.), j.4, h.133, Abu Abdurrahman Ahmad bin Ali an-Nasa'i, *as-Sunan al-Kubro li an-Nasa'i* (Beirut:Muassah ar-Risalah, 2001), vol.7, p.12

112 Mahmud Muhammad, *Syariat Allah,* p. 135.

body limb. If the victim did not want to forgive, then the perpetrator could return the stolen goods with more expensive one or the community could intervene to do *islah* (give solution).[113]

The Prophet also emphasized to be careful in implementing *hudūd*, it is best to avoid practicing it as much as possible. The Prophet said:

عن عائشة قالت قال رسول الله عليه وسلم ادرءوا الحدود عن المسلمين ما استطعتم فإن كان له مخرج فخلوا سبيله فإن الإمام أن يخطئ في العفو خير من أن يخطئ في العقوبة.

Narrated Aishah, that the Messenger of God said: avert the legal penalties from the Muslim as much as possible, if he has a way out then leave him to his way, for if the Imam makes a mistake in forgiving it would be better than making mistake in punishment. (At-Turmudzi)[114]

Based on the above mentioned hadith, the jurist then generated a *fiqh* directicve:

اَلْحُدُوْدُ تَسْقُطُ بِالشُّبْهَاتِ

"Hudūd should be dropped when there is uncertainty."

The above mentioned hadith also has given several opinions related to *hudūd* implementation. According to Syahrur, the punishment for thief by amputation of hands is the maximum punishment given.[115] Meaning that the judge could give minimum punishment to this crime if evidence to lessening the punishment given. This opinion can be supported just like what happened during Umar bin Khattab period for not cutting the thief's hands because there was reason to lessening the penalty.[116]

113 Mahmud Muhammad, *Syariat Allah,* p. 135.

114 Tirmidzi, *Sunan at-Tirmidzi,*vol.4, p.33.

115 Muhamad Shahrur, *Nahwa Ulul Jadidah li al-Fiqh al-Islami* (Damaskus: Al-Ahali, 2000).

116 Umar bin Khattab said: I prefer to be mistakenly not giving punishment because of the

In many occasion, the Prophet also modified the implementation of law in regard to the community welbeing. It was reported in a hadith that:

أَخْبَرَهُ بَعْضُ أَصْحَابِ رَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ مِنْ الْأَنْصَارِ أَنَّهُ اشْتَكَى رَجُلٌ مِنْهُمْ حَتَّى أُضْنِيَ فَعَادَ جِلْدَةً عَلَى عَظْمٍ فَدَخَلَتْ عَلَيْهِ جَارِيَةٌ لِبَعْضِهِمْ فَهَشَّ لَهَا فَوَقَعَ عَلَيْهَا فَلَمَّا دَخَلَ عَلَيْهِ رِجَالُ قَوْمِهِ يَعُودُونَهُ أَخْبَرَهُمْ بِذَلِكَ وَقَالَ اسْتَفْتُوا لِي رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ فَإِنِّي قَدْ وَقَعْتُ عَلَى جَارِيَةٍ دَخَلَتْ عَلَيَّ فَذَكَرُوا ذَلِكَ لِرَسُولِ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَقَالُوا مَا رَأَيْنَا بِأَحَدٍ مِنْ النَّاسِ مِنْ الضُّرِّ مِثْلَ الَّذِي هُوَ بِهِ لَوْ حَمَلْنَاهُ إِلَيْكَ لَتَفَسَّخَتْ عِظَامُهُ مَا هُوَ إِلَّا جِلْدٌ عَلَى عَظْمٍ فَأَمَرَ رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ أَنْ يَأْخُذُوا لَهُ مِائَةَ شِمْرَاخٍ فَيَضْرِبُوهُ بِهَا ضَرْبَةً وَاحِدَةً

Narrated some companions from Anshor that one of their men has suffered so much from some illness that he pined away until he was only skin and bone (i.e. only a skeleton). A slave girl of someone visited him and he was cheered by her and had unlawful intercourse with her. When his people came to visit the patient, he told them about it. He said: ask the Apostle of Allah about the legal verdict for me. So they mentioned it to the Prophet saying: We have never seen anyone (so weak) from illness as he is. If we bring him to you, his bone will disintegrate. He is only skin and bone. So the Apostle of Allah command them to take one hundred twigs and strike him once. (Abu Dawud)[117]

available evidence to lessening it rather than mistakenly giving punishment while there is evidence available to lessening it.This was the reason why he did not punish the thief by cutting his hands during economic crisis nor he punished a group of employee who stole camel from their master because he did not pay adequate salary for them. Quraisy Shihab, *Tafsir al- Misbah:Pesan, Kesan, dan Keserasian Al-Qur'an (Message, Impression and Harmony of the Qur'an)* (Jakarta: Lentera Hati, 2002), p. 110-115.

117 Abu Dawud, *Sunan Abi Dawud*, vol.4,p.161.

The above mentioned hadith infomed us that the punishment for *zina* is 100 lashes as it is stated in the Qur'an as *qath'i dilalah* (clear and certain evidence) and should not be carried out into 50, 40 or 30 lashes. However, The prophet modified the punishment of *zina* for a man who suffered from serious illness.

The implementation of *hudūd* by ignoring the chance of forgiveness violates the essence message of Islam. The thief is free from amputation by forgiveness from the victim so does the murderer. Forgiveness from the person who was accused of having illicit sex would drop the penaly for the accuser, so does for the rebel who repent and the state could consider it.These cases can be dropped even when the cases have been lodged to the court. Before God, any repentance is acceptable.[118]

However, several ulama stated that criminal cases which are lodged to the court could not be annulled with the reason that it could be used as a way of avoiding the verdict. A rebelious person who confessed of what has been done should not be granted punishment, although this case would rarely happen.[119] On the contrary, the Prophet Muhammad, as reported in several occasions tried to modify the punishment as much as possible to his people who committed crimes. One of the reports statesas follow:

حدثني عبد القدوس بن محمد حدثني عروة بن عاصم الكلابي حدثنا همام بن يحيى حدثنا إسحق بن عبد الله بن أبي طلحة عن أنس بن مالك رضي الله عنه قال : كنت عند النبي صلى الله عليه و سلم فجاءه رجل فقال يا رسول الله إني أصبت حدا فأقمه علي قال ولم يسأله عنه قال وحضرت الصلاة فصلى مع النبي صلى الله عليه و سلم فلما قضى النبي صلى الله عليه و سلم الصلاة قام إليه رجل فقال يا رسول الله إني أصبت

118 Wahbah, *al-Fiqh al-Islam,* vol. 7, p. 5564.

119 Mahmud Muhammad, *Syariat Islam,* p. 228

حدا فأقم في كتاب الله قال (أليس قد صليت معنا) .
قال نعم قال (فإن الله قد غفر لك ذنبك أو قال حدك)
صحيح البخاري

Narrated Anas bin Malik: "While I was with the Prophet a man came and said: 'O Allah messenger! I have committed a legally punishable sin, please inflict the legal punishment on me.' The Prophet did not ask him what he had done. Then the time for the prayer was due and the man offered prayer along with the Prophet and when the Prophet has finished his prayer, the man again got up and said: 'O Allah messenger! I have committed a legally punishable sin, please inflict the punishment on me according to Allah's laws.' The Prophet said, 'Havent you prayed with us?' He said: 'Yes.' The Prophet said, 'Allah has forgiven your sin.' Or said" '...your legally punishable sin.'" (Bukhari) [120]

In the mean time, Islam also prohibited someone or government officers to spy on any possible crimes committed in the community, especially, if the disgrace behavious did not cause any harm to other people or the state. Spying on this matter could violate the message of Qur'anic verse Al-Hujurat 49: 12:

يِيَا أَيُّهَا الَّذِينَ آمَنُوا اجْتَنِبُوا كَثِيرًا مِنَ الظَّنِّ إِنَّ بَعْضَ الظَّنِّ إِثْمٌ وَلَا تَجَسَّسُوا وَلَا يَغْتَبْ بَعْضُكُمْ بَعْضًا أَيُحِبُّ أَحَدُكُمْ أَنْ يَأْكُلَ لَحْمَ أَخِيهِ مَيْتًا فَكَرِهْتُمُوهُ وَاتَّقُوا اللَّهَ إِنَّ اللَّهَ تَوَّابٌ رَحِيم

O ye who believe! Avoid suspicion as much (as possible): for suspision in some cases is a sin: and spy not on each other behind their backs. Would any of you like to eat the flesh of his dead brother? Nay, ye would abhor it....but fear Allah: for Allah is Oft-returning, Most Merciful.

120 Bukhari, *Shahih al-Bukhari*, vol.8, p.166.

Qardlawi stated that in term of *hudūd*, there is no need to find evidence of the crimes nor to spy to prove the crimes, include in it is installing hidden camera so that the crimes could be detected. Even the state should not form a team to spy any possible crimes because it may violate human dignity and freedom.[121] A report from Hakim and Abdurrahman bin Auf stated that hewould patrol the city at night with Umar ibn al-Khattab, may Allah be pleased with him, and on one occasion they were walking when the lamp of a household caught their attention. They approached it until they heard loud voices inside the door. Umar grab the hand of Abdurrahman and he said:

> "Do you know whose house is this?" He said: "No". Umar said, "This is the house of Rabia ibn Umayah ibn Khalaf and they are inside drinking wine right now! So what do you think?" Abdur Rahman said, "Indeed, I think we have done what Allah has prohibited for us. Allah the exalted said: "Do not spy (49:12) and we have spied on them." Then, Umar turned away and he left them alone (al-Hakim dalam *al-Mustadrak*).

The Prophed said:

إِنَّ الأَمِيرَ إِذَا ابْتَغَى الرِّيبَةَ فِى النَّاسِ أَفْسَدَهُمْ

> *"Sesungguhnya seorang amir itu, jika ia mencari keragu-raguan (sehingga mencari-cari kesalahan) dari rakyatnya, berarti ia telah merusak mereka." (*HR Abu Dawud).[122]

In line with the above hadith, Imam al-Ghazali said: "In term of *jinayah* (criminal offence) or private affairs, Islam demands the concealment. Islam only observed an open fact without spying. One must try to avoid prying and asking personal questions about the private lives of others. Allah has prohibited it."[123]

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121 Yusuf al-Qaradlawi, الحدود اياضق يف وفعلاو رتستلا ىلع مالسإلا حرص retrieved fromhttp://www.qaradawi.net/new/library2/270-2014-01-26-18-47-27/2636-on Februari3, 2015.

122 Abu Daud, *Sunan Abi Dawud,*h. 739.

123 Al-Ghazali, *Ihya 'Ulum Ad-Din* (Beirut: Dar al-Khair, 1990), vol. 3, p. 28.

As explained before, to implement the Syari`ah law on earth, Islam employed gradual method (*tadarruj*). Gradual method of imposing law to the community aims at easily absorbing the law by the community. Islam was also introduced step by step in the period of Mecca and Medina. The Muslim community were initiated by giving doctrines related to faith, good behaviour and practical guidance. Later on, when the Muslim community has been stable, they are presented with legal sanctions.

Umar bin Abdul Aziz is the Chaliph who reformed the law gradually in his government which previously in chaos. There were many practices that contradicted the Islamic values like corruption and manipulation before him. The Chaliph then made significant reform step by step in every aspect of life and avoided any punishment. The historian once recorded that Umar bin Abdul Aziz's son Abdul Malik asked: "O father! Why did not you implement any sanction for your people. In the name of Allah, I would not care if I have to be burned in boiling water as long as you are always keeping the truth."[124]

This was the spirit of a young man whose father entrusted to be the leader of Islamic state and wish he could see his father eliminated any transgression immediately and he was ready to face any consequences. However, his father told him that: "No rush my dear son. For God has denounced wine twice then forbid it at third times. I feared that if I was hurry to disseminate the good things, they will disobey me and put a trial on me."[125]

Umar bin Abdul Aziz was a very thoughtful chaliph and carefully run his power. He understood that his son had passionately heighten to eradicate injustice and tyrani. His son eventually with emotion stated: "O commander of the faithful! How would you say to Allah when asked to you that you saw *bid'ah* (heresy) but you did not forbade it; you knew sunnah but you did not bring it to live."Umar answered: "May God bless you my dear son! In fact, my people has tied something within one bond at a time, and if I tried to

124 Ibn Abd Rabbih Al-Andalusi, *al-Aqd al-Farid* (Beirut: Dar al-Kutub al-Ilmiyah, 1404 H.), vol.5, p.185.

125 Al-Andalusi, *al-Aqd al-Farid,* vol.5, p.185.

untie it from their hands forcefully there will only blood shed occurred. In the name of Allah, I would rather choose the dissepearance of the world than blood shed because of me."[126]

Umar bin Abdul Aziz was remembered as the chaliph who elevated Muslim society into great Islamic civilization. He established welfare for the people above the sanctions and punishments and create justice for all. He imposed his reform gradually and putting the rights of the people first. A jurist, Mustofa az-Zarqa stated that: "the implementation of *hudūd* in recent era is impossible to do. Alternatifly, other forms of sanction can be used to replace it. Syari`ah should not be abolish entirely."[127]

An Indonesian scholar, Saiful Muzani, has conducted research on the relationship of implementation of Islamic Syari`ah and its public welfare. He compared its implemementation from the Islamic states that rejected democracy like Saudi Arabia, Pakistan, Sudan, Iran and Afghanistan to Islamic states that employed democracy as a state system. Five indicators were used to be analised namely: economic growth, equitable distribution of economy, educational level, life expectancy, and protection of the people. This research showed that there is no correlation between the implementation of Syari`ah to the people welfare. Regretably, in several Islamic states, Syari`ah implementation congruent with autocracy and controling women's rights.[128]

In the meantime though, according to Muzani, one Islamic state which implement Syari`ah has good level of public security. However, as being analised, it is not a result of *hudūd* implementation but as a repressive system adopted in autocracy to curbe people's protest and critics. Similar system was adopted by non- Muslim state like in Korea.

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126 Abu Na'im Ahmad al-Asfahani, *Hilyah al-Auliya* (Beirut: Dar al-Kutub al-Ilmiyah, 1409 H), vol.5 p. 282.

127 Musthafa az-Zarqa, *al-Madkhal al-Fiqhi al-'Am* (Damaskus: Dar al-Qalam,1998), vol.1, p. 283.

128 Saiful Mujani et.al., *Syariat Islam: Pandangan Muslim Liberal*(*Islamic Syari`ah: A Liberal Muslim's Perspective)*(Jakarta: Sembrani Aksara Nusantara, 2003), p. 39.

D. Repentance and Forgiveness

One important aspect in *hudūd* and *qishās*is the possibility of repentance and forgiveness without violating the rights of the victim to justice. Ignoring these opportunities will result in the elimination of compassion as Islamic value. In fact, repentance and forgiveness arstated in every verse of *hudūd* and has been practiced by the Prophets in many occasions.

According to the majority of ulama except Hanafi School, *had* or *hudūd* means prescribed punishment by shar'i related to either the rights of Allah (like *zina*) or the rights of human (like *qadzaf*). It is called *hudūd* because the form of punishment has been prescribed by shar'i and no one should not exceed it. Other opinion stated that original meaning of *hudūd* is *al man'u* (barrier), it is a barrier from indecency (*al-fawakhisy*).[129] In *hudūd*, the term repentance means for the perpetrator.

Repentance that is stated together in the discussion of *hudūd* has resulted different opinion among ulama whether it could annul the *hudūd* or not. According to the majority of ulama, repentance could not withdraw *hudūd* except in the case of *had hirabah* (armed robbery). This argument was based on the practice of the Prophet who punished Ma'idz by whipping him after he admittedly committed fornication. Reasonably, Maiz would not admit his illegal action unless he had repented before hands. Besides, the Qur'an did not state that repentance could drop the *hudūd*.[130]

Different from that of the majority of ulama, Al-Kasani (belongs to Hanafi madzhab) argued that repentance could annul *hudūd* as long as the case has not reached the court and the perpetrator reimbursed the damage caused by his crime. Similar opinion was also given by Ibnu Abidin who stated that *hudūd* should not be performed for person who repented as long as the case has not been lodged to the court. Imam Ahmad even has opinion that repentance could annul *hudūd* unconditionally, and this attempts could

129 Ahmad Khatib Syarbini, *Mughni Muhtaj ila Ma'rifati Ma'ani al-Fadz Minhaj* (Beirut: Dar al-Kutub al-Ilmiyah, 1994), vol.5, p. 460, Qulyubi, *Hasyiata al-Qulyubi wa Amirah* (Beirut: Dar al-Fikr, 1995), vol.4, p. 185.

130 Wahbah, *al-Fiqh al-Islam, p*. 170-171, Ar-Rohibani, *Mathalib Ulin Nuha fi Syarhi Ghayatil Muntaha*, (n.p.: Maktabah Islami, 1994), vol.6, p. 256.

encourage the perpetrator to repent. However, Imam Ahmad further stated that *had* for *qadhaf* (false accusation of illicit sex) is excluded from this provision because it is related to human rights and it can be annulled only by asking forgiveness from the victim.[131]

Disputes among ulama on the above mentioned case can be traced from different interpretations and understanding concerning Islamic texts (Qur'an and hadith) on *zina* and *qadzaf*. For example the Qur'anic verses on *zina* in An-Nur/24:2-5 are as follow:

الزَّانِيَةُ وَالزَّانِي فَاجْلِدُوا كُلَّ وَاحِدٍ مِنْهُمَا مِائَةَ جَلْدَةٍ وَلَا تَأْخُذْكُمْ بِهِمَا رَأْفَةٌ فِي دِينِ اللَّهِ إِنْ كُنْتُمْ تُؤْمِنُونَ بِاللَّهِ وَالْيَوْمِ الْآخِرِ وَلْيَشْهَدْ عَذَابَهُمَا طَائِفَةٌ مِنَ الْمُؤْمِنِينَ (٢) الزَّانِي لَا يَنْكِحُ إِلَّا زَانِيَةً أَوْ مُشْرِكَةً وَالزَّانِيَةُ لَا يَنْكِحُهَا إِلَّا زَانٍ أَوْ مُشْرِكٌ وَحُرِّمَ ذَلِكَ عَلَى الْمُؤْمِنِينَ (٣) وَالَّذِينَ يَرْمُونَ الْمُحْصَنَاتِ ثُمَّ لَمْ يَأْتُوا بِأَرْبَعَةِ شُهَدَاءَ فَاجْلِدُوهُمْ ثَمَانِينَ جَلْدَةً وَلَا تَقْبَلُوا لَهُمْ شَهَادَةً أَبَدًا وَأُولَئِكَ هُمُ الْفَاسِقُونَ (٤) إِلَّا الَّذِينَ تَابُوا مِنْ بَعْدِ ذَلِكَ وَأَصْلَحُوا فَإِنَّ اللَّهَ غَفُورٌ رَحِيمٌ (٥)

The woman and the man guilty of adultery or fornication – flog each of them with hundred stripes: let not compassion move you in their case, in a matter prescribed by Allah, if ye believe in Allah and the Last Day: and let a party of the believers witness their punishment. Let no man guilty of adultery or fornication marry any but a woman similarly guilty, or an Unbeliever: nor let any but such a man or an unbeliever marry such woman: to the believers such a thing is forbidden. And those who launch a charge against chaste women, and produce not four witnesses (to support their allegation) – flog them with eighty stripes; and reject their evidence ever after: for such men are wicked transgressor. Unless they repent thereafter and mend (their conduct); for Allah is Oft-Forgiving, Most Merciful.

131 Wahbah,*al-Fiqh al-Islami,* p.171.

From the cited verses above, almost all ulama agreed that *had* for *zina* is 100 stripes and *had* for *qadzaf* (false accusation) who could not provide four witnesses is 80 lashes. The disputes started form understanding whether repentance could withdraw *hudūd* is taken from the fifth verse (إِلَّا الَّذِينَ تَابُوا مِنْ بَعْدِ ذَلِكَ) and the *istishna* (exception) contained in this verse and whether *qadzaf* is the right of Allah or the right of human being.

There are three scopes covered by this *istishna* namely:

a. The exception *(istishna)* refers to the last phrase of (وَأُولَئِكَ هُمُ الْفَاسِقُونَ), meaning that exception applied for wicked transgressor (*fasiq*). They were called wicked transgressor because of their false accusation of chaste person with *zina* without any evidence and their witnesses were denied unless they repent. When they do this, their testimony accepted and they were no longer called wicked transgressor.[132]In this case, repentance declared for annulment of being labelled as wicked transgressor not the *had* itself. Al-Muzhiri cited the opinion of Imam Abu Hanifah argued that exception (*istishna)* was written after certain phrase which dependent upon other phrases, thus, it refered to the last phrase that is (وَأُولَئِكَ هُمُ الْفَاسِقُونَ) as to the last phrase which was disconnected from other phrase and it is called *isitishna munqati*.[133]
b. The exception *(istishna)* refered to all phrases before hand and thus means repentance could annul the label of *fasiq* and *had* for *qadzaf*. This opinion belongs to Sya'bi.[134] Sya'bi (and also several Shafiites) argued that when *istishna* is written after phrase using connecting *waw* (and), it refers to all the phrase available in the sentence as it is shown in this verse.[135]
c. Exception *(istishna)* in this verse is *mauquf* (stopped), according to Imam Ghazali. It is called *mauquf* because it is unknown whether the exception

132 Abu Abdillah Muhammad bin Idris As-Syafi'i, *Tafsir Imam Syafi'i*(Saudi Arabia: Dar at-Tadmiriyah, 2006), vol.3, p. 1119, Abu Mudzaffar as-Sam'ani, *Tafsir li Sam'ani* (Riyad: Dar al-Wath, 1997), vol.3, p. 500-503, Abu Hasan al-Khazini, *at-Ta'wil fi Ma'ani at-Tanzil*, (Beirut: Dar al-Kutub al-Ilmiyah, 1415 H), vol.3, p. 281.

133 Al-Muzhiri, *Tafsir al-Muzhiri* (Pakistan: Maktabah ar-Rusydiyah, 1412 H), vol.6, p. 448.

134 Ali Zaidi, *Mukhtasar Tafsir al-Bughawi,* (Riyad: Dar as-Salam, 1416 H), vol.5, p. 644.

135 Muhammad bin Makhluf ats-Tsa'labi, *al-Jawahir* (Beirut: Dar al-Ihya', 1418 H), vol.4, p.171.

refers to the entire phrases or only to the last one. Murthada argued that *istishna* in this verse is *musytarak* (dual meanings/ ambiguous) either to all phrases or to the last phrase. However, in this case it is aimed for *zahir musytarak* (clear but ambiguous) where *istishna* refered to the last phrase.[136]

In the mean time, the repent perpetrator was determined by whether *had* for *qadzaf* belongs to the rights of Allah or that of human. There are also three opinions concerning this issue:

1. *Qadzaf* belongs to the rights of human being. *Had qadzaf* depended on the victim accused. If the victim decided that *had* should be performed then be it. On the contrary, if the victim forgave the perpetrator, *had* should not be executed. This opinion belongs to Shafi'i School. The implication of this opinion showed that repentance is not automaticly dropped *had* but the forgiveness from the victim does.[137]
2. *Qadzaf* belongs to the right of Allah and it should not be modified with any other sanction. This opinion belongs to Hanafi School.
3. *Qadzaf* belongs to both rights (Allah and human).[138]

In my opinion, exception (*istishna*) refered to the entire verses, which covered *had zina* and *had qadzaf*, because these all are in the same chains of discussion. In this case, *had zina* could also be annulled by repentance unconditionally. Wahbah Zuhaily supported this opinion and argued as the most valid argument among Hambali School. Similar opinion is also supported by several ulama who belong to Hanafiites, Malikites, Shafi'ites and Zaidi ulama. Their argument is based on the narration from Anas bin Malik:

One day, Anas was with the Prophet Muhammad when a man came and said to the Prophet:

136 Al-Tsa'labi, *al-Jawahir,* vol.4, p.171.

137 Al-Thabari, *Jami'ul Bayan,* vol.19, p. 107.

138 Abu Hasan al-Mawardi, *An-Naktu wal Uyun* (Lebanon: Dar al-Kutub al-Ilmiyah, n.d.), vol.4, p.74.

يَا رَسُولَ الله إِنِّي أَصَبْتُ حَدًّا فَأَقِمْهُ عَلَيَّ قَالَ: وَلَمْ يَسْأَلْهُ عَنْهُ قَالَ: وَحَضَرَتْ الصَّلاَةُ فَصَلَّى مَعَ النَّبِيِّ صَلَّى الله عَلَيْهِ وَسَلَّمَ فَلَمَّا قَضَى النَّبِيُّ صَلَّى الله عَلَيْهِ وَسَلَّمَ الصَّلاَةَ قَامَ إِلَيْهِ الرَّجُلُ,فَقَالَ: يَا رَسُولَ الله إِنِّي أَصَبْتُ حَدًّا فَأَقِمْ فِي كِتَابِ الله, قَالَ: أَلَيْسَ قَدْ صَلَّيْتَ مَعَنَا؟ قَالَ: نَعَمْ, قَالَ: فَإِنَّ الله عَزَّ وَجَلَّ قَدْ غَفَرَ لَكَ ذَنْبَكَ أَوْ قَالَ حَدَّك

Narrated Anas bin Malik, While I was with the Prophet a man came and said: "O Allah messenger! I have committed a legally punishable sin, please inflict the legal punishment on me." The Prophet did not ask him what he had done. Then the time for the prayer became due and the man offered prayer along with the Prophet and when the Prophet has finished his prayer, the man again got up and said: O Allah messenger! I have committed a legally punishable sin, please inflict the punishment on me according to Allah's laws. The Prophet said, "Havent you prayed with us?" He said: "Yes." The Prophet said, "Allah has forgiven your sin." Or said: "...your legally punishable sin." (Bukhari and Muslim).[139]

From the above cited hadith, it can be inferred that *first*, the person who confessed that he committed sin/s should be punished. However, since he did not describe in detail what kind of sin he did, it is unnecessary for the Imam to excecute *had* on him. *Second*, according to al-Khattabi, the Prophet through the revealed message has known that God forgave the sin of this man and *had* should not be excecuted. *Third*, the implementation of *had* should be conducted at minimum risk and if possible to be avoided. In this case, the Prophet did not ask further about his sin but it should assumed that he did a minor sin.[140] Wahbah Zuhaily stated that the above hadith is used to support ulama's opinion that repentance could annul the implementation of *had* as

139 Bukhari, *Shahih al-Bukhari*, vol.8, p.166.

140 Ibnu Hajar, *Fath al-Bari,* vol.12, p. 134.

long as the perpetrators admitted and realised their transgressing behaviour.[141]

The annulment of *had* for *zina* also mentioned in the Qur'anic versesan-Nisa, 4:15-16 as follow:

وَاللاَّتِي يَأْتِينَ الْفاحِشَةَ مِنْ نِسائِكُمْ فَاسْتَشْهِدُوا عَلَيْهِنَّ أَرْبَعَةً مِنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ حَتَّى يَتَوَفَّاهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلاً. وَاللَّذَانِ يَأْتِيَانِهَا مِنْكُمْ فَآذُوهُمَا فَإِنْ تَابَا وَأَصْلَحَا فَأَعْرِضُوا عَنْهُمَا إِنَّ اللَّهَ كَانَ تَوَّابًا رَحِيمًا

If any of your women are guilty of lewdness, take the evidence of four (reliable) witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them, or Allah ordain for them some (other) way. If two men among you are guilty of lewdness, punish them both. If they repend and amend, leave them alone; for Allah is Oft-Returning , Most Merciful.

According to the exegetes, the word (الْفاحِشَةَ) in the above verses means *zina*. Whoever committed *zina* should be punished.[142] However, if they repent and amend their behaviour, the punishment is dropped.[143] This verse is in line with other Qur'anic verse An-Nur stated earlier. It is also supported by hadith:

التَّائِبُ مِنَ الذَّنْبِ كَمَنْ لَا ذَنْبَ لَهُ

"The one who repents from his sin is as if he had never sinned at all." (Ibnu Majah)

The Prophet encouraged his people to ask forgiveness and repent from all misbehaviour they ever did and amend their behaviour in accordance to

141 Wahbah, *al-Fiqh al-Islami,* vol.7, p. 5570.

142 Muhammad Mahmud, *at-Tafsir al-Wadih* (Beirut: Dar al-Jail Jadid, 1413H), vol.1, p. 347.

143 Ibnu Qudamah, *al-Mughni libni Qadamah*, Mesir, Maktabah Kairo, 1968), p. 152.

Islamic teachings. For those who repent the punishment is improper to do.[144] One narration recorded that the one who repent is Allah's beloved, and Allah will not give punishment for the beloved.[145] It should be noted that only repentance wholeheartedly is accepted in this case.[146]

Discussion on repentance also emerged in *hirabah* (armed robbery) as stated in the Qur'anic verses al-Maidah, 5:33-34:

إِنَّمَا جَزَاءُ الَّذِينَ يُحَارِبُونَ اللَّهَ وَرَسُولَهُ وَيَسْعَوْنَ فِي الْأَرْضِ فَسَادًا أَنْ يُقَتَّلُوا أَوْ يُصَلَّبُوا أَوْ تُقَطَّعَ أَيْدِيهِمْ وَأَرْجُلُهُمْ مِنْ خِلَافٍ أَوْ يُنْفَوْا مِنَ الْأَرْضِ ذَلِكَ لَهُمْ خِزْيٌ فِي الدُّنْيَا وَلَهُمْ فِي الْآخِرَةِ عَذَابٌ عَظِيم (٣٣) إِلَّا الَّذِينَ تَابُوا مِنْ قَبْلِ أَنْ تَقْدِرُوا عَلَيْهِمْ فَاعْلَمُوا أَنَّ اللَّهَ غَفُورٌ رَحِيمٌ (٤٣)

The punishment for those who fight against Allah and His Messenger, and those who do the damage in the land is: execution, or crucifixion, or the cutting off hands and feet from opposite sdes, or exile from the land: that is their disgrace in this world, and a heavy punishment is theirs in the hereafter except for those who repent before they fall into your power: in that case, know that Allah is Oft-Forgiving, Most Merciful.

The cited verses above on armed robbery concluded with the opportunity for the perpetrator to repent. This is in line with the basic principle of Islamic law: the protection of Muslim blood, body, and wealth.[147] Related to this principle, the Prophet said:

144 Ibnu Qudamah, *al-Mughni libni Qadamah*, p. 152.

145 Al-Munawi, *Taisir bi Syarh Jami' as-Shagir* (Riyad: Maktabah Imam Syafi'i, 1988), vol.1, p.459

146 Hafid Abu Fadl, *Tharhu Tastrib fi Syarh Taqrib* (Mesir: Dar at-Turats al-Arabi, n.d.), vol.8, p.41

147 Abdurrahman as-Sa'di, *Bahjatu Qulubil Abrar* (n.p.: Maktabah ar-Rusyd, 2002), vol.1, p. 131.

ادْرَءُوا الْحُدُودَ عَنِ الْمُسْلِمِينَ مَا اسْتَطَعْتُمْ فَإِنْ كَانَ لَهُ مَخْرَجٌ فَخَلُّوا سَبِيلَهُ فَإِنَّ الْإِمَامَ أَنْ يُخْطِئَ فِي الْعَفْوِ خَيْرٌ مِنْ أَنْ يُخْطِئَ فِي الْعُقُوبَةِ

Avert the legal penalties from the Muslim as much as possible, if he has a way out then leave him to his way, for if the Imam makes a mistake in forgiving it would be better than making mistake in punishment (HR. Imam Turmudzi)[148]

This hadith infomed us that *hudūd* implementation should be avoided whenever there is a chance. The Prophet emphasized that whenever there is a way to avoid punishment then leave it. The last part of the hadith stated that Imam who makes mistake in forgiving is better than that of making mistake in giving punishment.

Repentance and forgiveness in *jinayah* aimed not at escaping the perpetrator fromthe prescribed punishment nor disregarding victim's right to justice. Repentance and forgiveness should be regulated as not to be used as an excuse for escaping the punishment. The Qur'an accommodated the right of the victim by requiring *diyat* (financial compensation) payment to the perpetrator. At the same time, the victim is directed not to exploite or presurise the perpetrator to get financial benefit from it. The Qur'an pointed on how to perform a targeted repentance (*tawbatannashuha*) as stated in the Qur'anic verses an-Nisa, 4:17-18:

إِنَّمَا التَّوْبَةُ عَلَى اللَّهِ لِلَّذِينَ يَعْمَلُونَ السُّوءَ بِجَهَالَةٍ ثُمَّ يَتُوبُونَ مِنْ قَرِيبٍ فَأُولَئِكَ يَتُوبُ اللَّهُ عَلَيْهِمْ وَكَانَ اللَّهُ عَلِيمًا حَكِيمًا (٧١) وَلَيْسَتِ التَّوْبَةُ لِلَّذِينَ يَعْمَلُونَ السَّيِّئَاتِ حَتَّى إِذَا حَضَرَ أَحَدَهُمُ الْمَوْتُ قَالَ إِنِّي تُبْتُ الْآنَ وَلَا الَّذِينَ يَمُوتُونَ وَهُمْ كُفَّارٌ أُولَئِكَ أَعْتَدْنَا لَهُمْ عَذَابًا أَلِيمًا (٨١)

148 Tirmidzi, *Sunan at-Tirmidzi,*vol.3, p.85.

Allah accepts the repentance of those who do evil in ignorance and repent soon afterwards; to them will Allah turn in mercy: for Allah is full of knowledge and wisdom. Of no effect is the repentance of those who continue to do evil, until death faces one of them, and he says, 'now have I repented indeed;' nor of those who die rejecting Faith: for them have We prepared a punishment more grievous.

Some notes from the repentance and forgiveness discussions are to differentiate strictly between *zina* and rape. They are two different matters but usually situated in similar position. The chance to repent in *zina* case should not be used and manipulated by rape offender to escape from punishment and walked away without responsibility for the victim.

Repentance and forgiveness are also obtainable for the murder case. The regulation related to the victim's family forgiveness is stated in the Qur'an on *qishās* . However, there are different opinion among ulama to determine whether there is interconnectedness between forgiveness with *qishās* and *diyat*. According to Hanafiite and Maliki ulama, forgiveness (*al-'afwu*) could withdraw *qishās* unconditionally without paying *diyat*. When the victim's family forgive the offender and require the perpetrator to pay *diyat*, it is called *islah suluh* not *al-'afwu*.

The above opinion is different from that of Shafi'ites and Hanbali School who argued that forgiveness could annul the *qishās* both ways: with or without the payment of *diyat*. The payment of *diyat* can take two forms: cash or instalment. The victim's family through its guardian can choose whatever payment and the offender should agreed.[149] Other sanction can also be provided as an alternative of *diyat* payment as mentioned in *fiqh* books and based on the Prophet saying:[150]

وَمَنْ قُتِلَ لَهُ قَتِيلٌ فَهُوَ بِخَيْرِ النَّظَرَيْنِ، إِمَّا أَنْ يَعْفُوَ، وَإِمَّا أَنْ يَقْتُلَ

If someone's man is killed then he has a choice of two things either to pardon or to kill (the murderer)." (At-Thirmidzi)

149 Wahbah,*al-Fiqh al-Islami,* p. 288

150 Tirmidzi, *Sunan Tirmidzi,* vol.3, p. 73.

There are two conditions that should be met for granting forgiveness; *first*, the one who is given the authority to forgive is a mature and rational person; *second*, the one who is appointed is the right person to do from among the male or female victim's heirs.

Islam praised the family's victim who offered forgiveness to the offender while their rights to justice also preserved. Islam emphasizes that granting forgiveness is better than implementing *qishās*.[151] It is supported by the Qur'anic verses al-Maidah, 5:45 and al-Baqarah, 2:178. The *fiqh* jurists agreed that the willingness of the victim's family to forgive can withdraw the *qishās*.[152]

Abdul Malik al-Qushayri has an interesting opinion on the relationship between *qishās* and the forgiveness of the family heirs:

حق القصاص مشروع، والعفو خير، فمن جنح
إلى استيفاء حقه فمسلّم له، ومن نزل عن ابتغاء
حقه فمحسن، فالأول صاحب عبادة بل عبودية،
والثاني صاحب فتوة بل حرية والدم المراق يجرى
فيه القصاص على لسان أهل العلم، وأمّا على لسان
الإشارة لأهل القصة فدماؤهم مطلولة وأرواحهم هدرة

The implementation of qishās is part of Islamic teachings. However, giving forgiveness is much more encouraged than qishās. Whoever choose to perform qishās is permissible, in the mean time whoever could forgive is respected. The first choise is part of ibadah (worship), and the second is wisdom and right thinking. The blood shed should require qishās according to scientist; meanwhile, the sufi noted that their bloods are lawful (halal) and their souls are vain and qishās is unnecessary.[153]

151 Abu Zakariya Muhyiddin Yahya Ibn Syaraf an-Nawawi, *al-Majmu' Syarah al-Muhadzdzab,* (Damaskus: Dar al-Fikr,t.th.), vol.18, p. 446, Ibnu Qudamah, *al-Mughni*, vol.8, p. 352, Abdul Adzim, *al-Wajiz fi Fiqh as-Sunnah wal Kitab* (Mesir: Dar Ibnu Rajab,2001), vol. 1, p. 453.

152 Kementrian Waqaf Kuwait, *Mausu'ah*, vol.33, p.275.

153 Abdul Malik al-Qusyairi, *Latha'if al-Isyarat* (Mesir: Haihah al-Am li al-Kitab, n.d.), vol.1, p.150.

Several hadith supported forgiveness without ignoring the victim's right for justice. Imam as-Syaukani in his book *Nailil Authar* collected four hadith on this matter:

مَا رَأَيْت رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ رُفِعَ إلَيْهِ شَيْءٌ فِيهِ قِصَاصٌ، إلَّا أَمَرَ فِيهِ بِالْعَفْوِ

I never saw the apostle of Allah make decision regarding the qishas except that he asked for forgiveness. (HR. Abu Daud)[154]

The instruction word in this hadith means obligation and giving the punishment is the right of the victim's family. However, the hadith suggested that the heir's family to resolve it peacefully either by giving forgiveness or paying blood money.[155] This regulation is aplied also to making decision on *ta'zir*.[156]

Other hadith mentioned:

مَا مِنْ رَجُلٍ يُصَابُ بِشَيْءٍ فِي جَسَدِهِ فَيَتَصَدَّقَ بِهِ إِلَّا رَفَعَهُ اللَّهُ بِهِ دَرَجَةً وَحَطَّ بِهِ عَنْهُ خَطِيئَةً

No one should fall under his dead body but he tolerate it, Allah will praise his degree and deprive his mistakes. (Ibnu Majjah).[157]

Repentance can annul *qishās* and *ta'zir* and it is even encouraged as favourable and as a form of solidarity. Repentance minimised dreadful impact caused by *qishās* and *ta'zir* and preserved the objectives of Syari`ah (*maqasid asy-Syar'iyah*) like protecting life, preventing disharmony and aggression and

154 Syaukani, *Nail al-Authar* (Mesir: Dar al-Hadis, 1993), vol. 7, p.38.

155 Abdul Muhsin ibn Hamdun al-'Ibad, *Syarah Sunan Abi Daud lil Ibad*(Maktabah Syamilah), vol. 505, p. 11.

156 Abu Abdullah al-Muwaqy, *at-Taj wal Iklil li Mukhtasar Khalil* (Beirut: Dar al-Kutub al-Ilmiyah, 1994), vol.8, p. 436, al-Qarafy, *al-Furuq*, (Maktabah Syamilah), vol.4, p. 181.

157 Syaukani, *Nail al-Authar,*p.38.

so on.[158] It also provides the right of the victim to justice. Besides, repentance and forgiveness should not be used as an escape for high profile offenders.

In the mean time, a new understanding of *qishās* should be proposed. *Qishās* originally means equal or similar. What does it means by similar in this case? According to Islamic jurispridence (*fiqh*), similar in this case is similar in way employed and tool used that made someone murdered. However, the similarity should attempt for the way on how someone died whether sooner or later. Within this parameter, someone who is sentenced to 500 years for murder basically have died. The Qur'an does not encourage *qishās*; instead it emphasizes on equality and justice and protect the rights of both the victim and the offender.Chapter Four

158 Wahbah,*al-Fiqh al-Islam,* p.287.

The Portrait Of The Application Of Hudūd In Contemporary Muslim Countries

Since its emergence, the regulation of *hudūd* has not been a concept isolated from human history, but closely interracted with social changes in Muslim society. There must have been similarities in its implementation in the past and present. However, social, economic, politic, and cultural differences can transform the *hudūd* paradigms and methods, and its impacts on Muslim communities. This chapter discusses the experiences of several Muslim countries in their attempt to implement *hudūd*. It also analyses the shifting paradigms, methods, development and different applications of *hudūd* in those countries.

A. Why *Hudūd*?

It is a fact that Muslim communities now live in different political contexts. They live in many different countries that adopt different political systems as follows:

1. Islamic Monarchy or Sultanate which independently established and not affiliated to other countries like the monarcy of Saudi Arabia and Brunei Darussalam.
2. Islamic Monarchy or Sultanate which is part of and affiliated to other countries like Sultanate of Kelantan, Perlis and Johor are part of Malaysia.
3. Republic which formulates Islam as its state constitution like Pakistan, Iran, and Afghanistan.
4. Republic where the majority of its population is Muslim but not adopted Islam as its state constitution like in Indonesia.

5. Secular Muslim country where Muslim is the majority inhibitant but differentiate clearly between religion and state just like Turkey.
6. Muslim minority groups in secular developed countries like in America, Great Britain and Europe.
7. Muslim minority groups in developing countries like in Thailand and Sri Lanka.

These different contexts of Muslim communities influence their negotiating capacity to the state power. For example, the experience of Muslim community living in Iran where the position of ulama is strong differs significantly from that of living in America where getting a political position is difficult. Similarly, the experiences of Muslim community in Indonesia who are facilitated to perform religious rites differ from that of Muslim community in Filipina who are the minority. Correspondingly, the implementation of Syari`ah law in Muslim countries like Iran, Saudi Arabia, Pakistan and Brunei which adopted Syari`ah law as state constitution are different from that of in Kelantan, Malaysia, Zamfara, Nigeria or Aceh, Indonesia.

These differences faced by Muslim communities related to Islam and the state have given significant influences in *hudūd* implementation. Differ from *ibadah* (worship) and personal matters (*al-Akhwal asy-Syakhsyiyyah*), the implementation of criminal law that include *hudūd* ordinance has to have strong support from political authority in power. Besides, many Muslim majority countries are already having their own Criminal laws that differ from that of Islamic Criminal Law. During the collonialisation in many Islamic countries, the colonial changed the Islamic law with a new law gradually. The first Islamic law changed was criminal law including *hudūd* and followed by other laws. However, family law and inheritance law remained.[159]

Colonialisation that occupied many Islamic countries was triggered by World War I in 1914 -1918 and World War II in 1939 – 1945. At that time,

159 Abdullahi an-Na'im, *Toward an Islamic Reformation* (New York: Syracuse University Press, 1987), p. 33.

to preserve world peace, a United Nation was established on October 24, 1945 and initiated by five countries namely: America, England, Rusia, France and China. In 2013, it is recorded that almost 192 countries have joined the United Nation. The following are names of several Muslim majority countries that joined The United Nation namely: Egypt (on October 24, 1945), Iran (October 24 October, 1945), Saudi Arabia (October 24, 1945), Syiria (October 24 October, 1945), Iraq (December 21, 1945), Afghanistan (November 19, 1946), Pakistan (September 30, 1947), Indonesia (September 28, 1950), Jordan (December 14, 1955), Moroko (November 12, 1956), Sudan (November 12, 1956), Malaysia (September 17, 1957), Kuwait (May 14, 1963), Bahrain (September 21, 1971), and Brunei Darussalam (September 21, 1984).

On December 10, 1948, the United Nation declared Universal Human Rights that was famously called Declaration of Universal Human Rights. It covers several issues such as: (1) The right of equality, freedom and safety for all people; (2) Free from slavery, torture and degrading human dignity; (3) Recognition of individual before law in finding justice; (4) Freedom of expression and political participation. These rights bounded the member of The United Nations countries to fulfill. Declaration that contain basic human rights was broken down into convention, namely: (1) Convention on genocide (1984; in effect 1951); (2) Convention on elimination of racial discrimination (1965; in effect 1969); (3) Convention on elimination of discrimination against women (1979; in effect 1981); (4) Convention on oppression and punishment of Apartheid's crimes (1973: in effect 1976); and (5) Convention on rejection of torture and severe punishment, inhuman, and degrading human's dignity (1984, in effect 1987). Significant development occured on December 18, 1979 where general assembly of the United Nations approved convention draft on *the Elimination of all forms of Discrimination Against Women (CEDAW)* and effectively passed in 1981 after receiving the approval from 20 countries.

Human rights and Islamic law differ in regard to the relationship between Muslim and non-Muslim. From the human rights perspective, the relations

are equal, while Islamic law views these in a different way. Furthemore, the contestation also appeared in Hudūd practice where human right see it as a cruel punishment, inhuman and degrading human's dignity. On the contrary, Islamic law comprehended those law as prescribed by God, thus, it should be implemented. In regards to women's context, the confrontation arised on many various issues such as polygamy, child marriage, woman's inheritance, woman's witness, wife beating, and woman's circumcission. These conflicts have triggered the previous wounds during colonialisation where Muslim community had no freedom to practice Islamic law. Several Muslim countries agreed to ratify several International convention initiated by the United Nations as long as it does not contradict Islamic law. Based on this statement, then, the CEDAW's convention and the convention on opposition against torture and other punishment that consider cruel, inhuman and degrading human dignity became two conventions which are difficult to ratify.

According to Ziba Mir-Hosseini, a Muslim feminist, 1979 was a year of backdrop of the politics of religion, culture and gender in local level as well as global. In this year, the United Nations adopted the *Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW) that became international basis to fight for gender equality. Nevertheless, this year also a victory for political Islam when Iran established Islamic revolution that put ulama in power, and also Pakistan to widen the *fiqh* discussion by establishing the decree on *Hudūd*.[160]

The following are the Islamic criminal laws adopted by Muslim countries namely: Libya in 1972, Pakistan (1979), Iran (1979), Sudan (Civil Law, 1983 dan Criminal Law, 1991), and Yaman (Civil law, 1994). At first *hudūd* was a national law in several Muslim countries, but the trends showed that this law has been implemented in several districts and provinces like in Nigeria in 1999-2000.[161] Nowadays, the implementation of *hudūd* has also been adopted by several countries in Southeast Asia including Indonesia. Kelantan, Malaysia became the first of Southeast Asian region that adopted

160 Ziba Mir Hosseini, *Memidanakan,* p. 9.

161 Ziba Mir Hosseini, *Memidanakan*, p. 10.

hudūd and *qishās* in 1993 through the Bill of Klantan Criminal Syari`ah (Kelantan Criminal Code Enactment-II). It is followed by Aceh, Indonesia, in 2002 by the approval of *qanun* of Nangroe Aceh Darussalam number 10, 2002 on the Islamic Syari`ah Court. Last, Brunei Darussalam announced the implementation of Islamic criminal law Islam on Mei 1, 2014 through the instruction of *Kanun Hukuman Jenayah Syariah* 2013 (the enactment of *jinayaSyari`ah* punishment).

At least, eight countries of the United Nations members adopted *hudūd* implementation namely Pakistan, Iran, Sudan, Yaman, Nigeria, Malaysia, Brunei Darussalam, and Indonesia. Taufik Adnan Amal and Samsu Rizal Panggabean listed seven factors that inspired several countries to enact Islamic Syari`ah with *hudūd* as part of it, specifically:

1. Religious justification, that the enactment of Islamic Syari`ah is the obligation of Muslim. In the mean time, Abduh argued that Islamic Syari`ah would not be implemented unless there is support from political authority (*al-quwwah*), otherwise, the people will disobey Islamic teachings. In this context, however, Abduh did not identify Syari`ah to strict legal regulation but radical Muslim did. Qur'anic verse Al-Maidah, 5:49 which contains the instruction to govern disputes based on God's law is one of the religious texts used to justify the use of hudud.[162]
2. Revitalization of post-colonial law. During colonialisation in many Muslim's countries, the colonials changed Islamic Syari`ah law with their own law (Western Law) and the criminal law was the first to be affected. Criminal law was the least position of all Islamic Syari`ah to be defended, but family law and inheritance were maintained. In this context, re-enactenactment of *hudūd* and qishās is a symbol of disagreement to surrender to the colonial and also a symbol of freedom to implement Islamic Syari`ah as a mandate of religious belief.

162 Several Muslims interpret the verse *Ma Anzalallahu*- that has been ordained by Allah- to the laws that stated in the Qur'an and Sunnah. This interpretation did not accommodate the whole picture of the verse because the verse used *lafad 'am* (general intention) that also include all other laws t not stated in the Qur'an and Sunnah.

3. Arab - Israel War. The war between Arab and Israel that were triggered by the Israel occupation into Palestine and the Arab was defeated in 1967 has resulted in trauma among Muslims. This case was interpreted that the Muslims turned away from their religious teaching. Then, the solution to resolve the situation was by returning and revitalizing Islamic teachings, and one of them was by implementing Syari`ah Law. This is supported by the fact that Muslim countries generally do not use Islamic law as their national law even though the principles of Islamic law have been integrated into their law. Theimplementation of Islamic Syari`ah, however, was orientated to usethe classical *fiqh* books by usingthe tool of state officers, not to use dynamic legislation and methods which possibly involve active participation from the society.
4. Globalisation. Globalisation is understood as giving negative influence to the Muslim cultures through the adoption of capitalist ideology and liberal democracy that have loosened Muslim's institution and values. However, Western institutions and values were identified as failed to solve problems emerged in Muslim community. On the contrary, these have been known as the reasons for Muslim regression in many aspects of their lives. In this context, implementing Islamic Syari`ah is the answer to all those problems.
5. Domestic economic crisis. Economic crisis and widening the gap between the poor and the rich in Muslim countries and other crisis like monetary crisis, inflation, unemployment, and incomprehensible of health facilities have resulted in potential hope in the implementation of Islamic Syari`ah.
6. Failed States. Development ideology employed by Muslim rulers gave no significant development in political and social life of Muslim community. On the contrary, this ideology has facilitated the leader of the state to gain personal and his crony's benefits. Meanwhile, the Muslims society under their power were suffered. Dictatorship, state opression, social injustice, unsuccsesful development by ignoring local wisdom, domination of governmental members, corruption, and nepotism contribute significantly to the demand of Syari`ah law implementation.

7. Political chaos. Islamic Syari`ah is used to publicly gain political support and fondation to remain in power. One of the examples is the implementation of Syari`ah law in Indonesia which is connected with the governmental policy that give space for the possibility of the enactment of Syari`ah law like the Decree of Regional Autonomy No. 22 year 1999 and several attempts to amend the 1945 national constitution (UUD 1945).

The above mentioned factors encouraged the implementation of Islamic Syari`ah in many Muslim countries in Africa such as Egypt, Sudan, and Nigeria and in Asia like Pakistan, Afganistan, Malaysia and many others in recent era. This fenomena mean that the demand to implement Syari`ah law is getting bigger as shown by more and more Muslim countries which try to enact this law more than before.

The seven factors above inferred that there have been changes in the implementation of criminal law in Muslim society today with that of in the Prophet Muhammad's period. In the Prophet's era, physical punishments like flogging, *qishās* (in the case of murder or amputation of limbs), and *rajm* (stoning to death) are the types of punishment that have long been practiced in Arab society. These punishments, which seemed inhuman, were responded by Islam by inserting a new protocol such as that the punishment should not be conducted excessively, attending to equal rights (in punishment or compensation), by giving opportunity to facilitate forgiveness and repentance without ignoring the victims' rights to receive fair compensation. Thus, the emphasis is not on the form of the punishment just like what the Muslim modern country is trying to employ, but to the norms and ethics of its implementation in accordance with the spirit of Islam.

There are many differences in other aspects of *hudūd*. For example, although *hudūd* is believed as the ordinance prescribed by Allah and the Messenger, there are various interpretations available in its implementation. Thus, its meaning vary in different time and context.[163]

163 Ziba Mir-Hosseini stated about the contestation between Human Rights and Islamic Law in general including *hudūd*.See Ziba Mir Hosseini, *Memidanakan*, p. 5.

B. Varied Interpretation of Penalty Provisionsin *Hudūd*

Hudūd is believed to be a form of Islamic law whose types and categories have been determined directly in the Quran and Hadith. Thus its level of certainty is highly accepted and its implementation is undisputable. In reality, however, since its classical period up to now, disputes related to *hudūd* occured. In the past some disputes were related to categories of crimes, degrees of punishment, definition, religious texts used, exceptions, and implication of repentance and forgiveness. In recent era, disputes related to the regulations of *hudūd* also occured in many aspects by states institution.

In this discussion, four countries or state members which only start to enact or the countries which have implemented Islamic law will be analysed on the disputes related to *hudūd* regulations. First, Pakistan: *Pakistan Penal Code* (Act XLV of 1860) Act XLV of 1860, October 6th, 1860 for *qishās* and theft. Regulation on *qishās* is stated in *Chapter XVI of Offences Affecting the Human Body*, and regulation on theft in *Chapter XVII of Offecences Against Property,*(2) *the Prohibition (Enforcement of Had) Order, 1979* for drinking intoxication, (3) *Offence of Zina (Enforcement of Hudood) Ordinance, 1979* on *Zina*, dan (4) *the Offence of Qadzaf (Enforcement of Had) Ordinance, 1979* on *Qadzaf;* second, Sudan: The regulation of *hudūd* stated in *al-Qanun al-Jana'i 1991* as a result of amended *Qanun al-Uqubat* 1983; third, Kelantan, Malaysia:*Enakmen Kanun Jinayah Syariah* year 1993 (the enactenactment of *jinaya Syari`ah* ordinance of 1993); and fourth, Brunei Darussalam:*Kanun Hukuman Jenayah Syariah,* 2013 (the *Jinaya Syari`ah* ordinance of 2013).

These four countries have similarity in history but with different vigorous settings. Pakistan become a Muslim country after being separated from India on June 3, 1947. One reason to established Pakistan was to fulfill the Muslim community rights which were disregard while they were a minority group among Hindu majority in India. This strong background of establishing Islamic identity in Pakistan influenced the model of its Syari`ah implementation.

Similarly, Sudan was colonized by the British and gained its independence on January 1, 1956. After independence, Sudan was ruled by a secular rezim who continue to implement collonial policies and regulation on Islamic

law related only to civil law. Drastical change occured on September 8, 1983 when president elect at that time, Numery issued a decree on the implementation of Syari`ah law as a constitution adopted in Sudan. Since then, Islamisation was massively promoted in many aspects of life including on the enactenactment of Islamic criminal law through *Qanun al-Uqubat* (punisment ordinance) in 1983 that regulated on theft, armed robbery, drinking intoxication, *zina, qadzaf*, and apostacy. In addition, physical punishments were introduced like cutting hands, flogging, and stoning to death (*rajm*). This ordinance was amended in 1991 and became *al-Qanun al-Jinai*.

Malaysia, just like Pakistan and Sudan, was collonized by the British and received independence on August 31, 1957. The Muslim population, Melayu origin, in this country is 60 per cent (60 %) of all other residence of Budhist, Chinese and India (19 %), Christian (9 %) and Hindu (6 %). Malaysian constitution part I, chapter 3 stated that Islam is the federation's religion, however, other religions is recognized and allowed. According to Tuanku Abdul Rahman, the first prime minister, Malaysia is not a Muslim country but Islam is considered an official religion of the country.[164] At first, Islamic identity in Malaysia focuses on the implementation of Islamic values in everyday life and not to implement Islamic Syari`ah, especially Islamic criminal law. Lately, the demand to implement Islamic Syari`ah law that include *hudūd* is getting strong. Thus, in 1993 Kelantan, a region in Malaysia, started to implement Syari`ah law by establishing *Enakmen Kanun Jinayah Syariah*, followed by *Enakmen Kesalahan Jenayah Syariah (Hudūd and Qishās)* in other region Terengganu in 2002. These two ordinance laws cannot be implemented yet because they are regarded to be contradictory with the Malaysian Federal Law, but any efforts in order the laws can be implemented still continue.

Brunei Darussalam is a monarch that was occupied by the British until they gained independence on January 1, 1948. Occupied by mostly Melayu origin (about 66 %) of 400 people, Brunei is famous by its small

164 Taufik dan Samsu, *Politik Syariat Islam, p.* 157.

and prosperous country. The Sultan (the King) has an absolute authority and although he has ministers, they consist of the Sultan family. After independence, Brunei introduced its Melayu ideology called Melayu Islam Beraja (MIB) to bond the loyality of the people. Apart from its prosperous country, Brunei is famous by its integrity in implementing Syari`ah law. Islam has been spread and established in Brunei since the Sultan Syarif Ali, the third Sultan in1425 CE. Islam continues to grow significantly and becomes the majority population in Brunei. In 2013, Sultan Hassanal Bolkiah authorized *Perintah Kanun Hukuman Jenayah Syariah* (the implementation of jinaya punishment) and was in effect in 2014.

The regulation of *hudūd* in these four countries is as in other countries, in which *hudūd* is defined as regulation prescribed by God and God's Messenger and this can be seen as follow:

Pakistan: "*Had*" means punishment ordained by the Holy Quran or Sunnah (Chapter I: Preliminary of The Prohibition (Enforcement of Had) Order, 1979).

Kelantan Malaysia: *Hudūd* punishment regulated in the *Enakmen* should not be suspended, or altered with any other punishment, or reduced or forgiven; or attempted at any procedure to change or transferred (Bahagian IV Seksyen 48 Enakmen Kanun Jinayah Syariah (II) 1993- Chapter IV, Point 48 of Enakmen Kanun Jinayah Syariah (II) 1993).

Brunei: What are meant by these orders: "*Had"* means punishment or penalty that has been prescribed in the Qur'an and Sunnah of the Prophet Muhammad for the crimes of *sariqah (theft), hirabah (armed robbery), zina (fornication and adultery), qadzaf (false accusation of illicit sex)*, drinking intoxication, and *irtidad (apostacy)* (Bahagian IV Penggal I Seksyen 51 Perintah Hukuman Kanun Jenayah Syariah Tahun 2013 - Chapter IV, section 51 of the Orders regarding jinaya Syari`ah ordinance of 2013).

Different from that of stated in the above discussion, Sudan stated only categories of crimes included in *hudūd*, as follows:

”جرائم الحدود» تعني جرائم شرب الخمر والردة والزنا والقذف والحرابة والسرقة الحدية

Crimes categorized as hudūd are drinking intoxication, apostachy (riddah), zina (fornication and adultery), qadzaf (false accusation of illicit sex), hirabah (armed robbery), and theft (Chapter I, al-Qanun al-Jana'i Sudan, 1991).

The above mentioned definitions in all decrees assume that *had* or *hudūd* are prescribed by Allah and the Messenger of Allah. Thus, these ordinaces should not be offended otherwise it is considered as trangressing God's and The Messenger's commands. Besides, when assuming that they are considered God's commands, there are indisputabled to in its regulations. Contrary to the fact, many differences occured in the regulation of *hudūd*. For example, disputes related to categorisation of crimes are included in *hudūd*. From all the above categorisations mentioned in four countries ordinances there are four fixed categorisations of crimes namely as they are approved according to the majority of classical ulama: *zina*, *qadzaf,sariqah*, and *hirabah*. Other crimes not established by classical ulama but mentioned and regulated in four countries and included in *hudūd* ordinances are drinking intoxication and apostachy (*irtidad)*.

One aspect that is not mentioned in the Qur'an and hadith is related to minimum age of person affected by these punishments. Pakistan regulated different age adopted for different crimes punishment namely: 18 years old or has reached puberty for *had syurb al-khamr* (drinking intoxication punishment), 16 years old for woman and 18 years old for man or have experienced puberty for *had zina* and *qadzaf*, meanwhile, for murder punishment the minimum age is 18 years old whether the person has reached puberty or not.

"Adult" means a person who has attained the age of eighteen years or puberty (President's Order No. 4 of 1979 on The Prohibition (Pakistan, Enforcement Of Had Order).

"Adult" means a person who has attained, being a male, the age of eighteen years or, being a female, the age of sixteen years, or has attained puberty (Ordinance No. VII of 1979 on The Offence of Zina (Enforcement of Hudood Ordinance and Ordinance No. VIII of 1979 on The Offence of Qadzaf (Pakistan, Enforcement Of Had Ordinance).

"Adult" means a person who has attained the age of eighteen years (Pakistan, Ordinance No. XVI of Offences that Affect the Human Body).

Besides Pakistan, countries like Sudan, Kelantan Malaysia, and Brunei has only one definition of adult or *baligh* or *mukallaf*. In Sudan, the minimum age for person subjected to *hudūd* ordinances is 15 years old or when the sign of physical puberty is seen or 18 years old with no sign of puberty. In addition, Sudan also regulated the maximum age for flogging punishment is 60 years old.

"بالغ» يعني الشخص الذي ثبت بلوغه الحلم بالأمارات الطبيعية القاطعة وكان قد أكمل الخامسة عشرة من عمره، ويعتبر بالغا كل من اكمل الثامنة عشرة من عمره ولو لم تظهر عليه امارات البلوغ .(القانون الجنائي لسنة ١٩٩١) فيما عدا جرائم الحدود، لا يحكم بالجلد عقوبة على من بلغ الستين من عمره .(القانون الجنائي لسنة ١٩٩١)

Baligh (puberty) means a person who reached the age when physical changes are seen and have reached 15 years old. Or a person who has reached 18 years old although he/she has not seen the sign of his/her puberty. Apart from hudūd punishment, no one subjected for flogging punnishment when they reached the age of 60 years old.

Malaysia regulated the minimum age for *hudūd* punishment is 18 years old, and it is called "*Mukallaf*", a person who has reached 18 and be intelligent (Enakmen Kanun Jenayah Syariah (II) 1993). Brunei regulated younger age

for those who subject for *hudūd* punishment and Brunei used the Islamic calender: "*Mukallaf*" means a person who has reached 15 years old according to *qomariyah* year (Islamic calender) and be intellegent (Perintah Kanun Hukuman Jenayah Syariah, 2013).

In addition to age, other significant differences are related to definition of crimes and its categorisation. For example, the definition of *zina* can be seen as follow from these four countries:

> Pakistan: A man and a woman are said to commit zina if they willfully have sexual intercourse without being married to each other. Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of zina.

Sudan:

> الزنا (١) :يعد مرتكبًا جريمة الزنا) : (أ) كل رجل وطئ امراة دون رباط شرعي ، (ب) كل امراة مكنت رجلا من وطئها دون رباط شرعي (٢) يتم الوطء بدخول الحشفة كلها اوما يعادلها فيى القبل(٣) لايعتبر النكاح المجمع على بطلانه رباطًا شرعيًا (القانون الجنائي لسنة 1991)

> *(1) Zina offence happen when [a] a man has sexual intercourse without any legal shar'i relation, [b] a woman who gives opportunity to a man to have sexual relation with her without being tied to each other according to shar'i, (2) Sexual intercourse means penetration of penis into vagina (3) marriage that has not been legalised by ulama considered as void in accordance to shar'i marriage.*

Kelantan, Malaysia: 10. (1) *Zina* is an offence of having sexual relationships between a man and a woman not married to each other, and

this sexual intercourse is not categorised as *takrif "wath'i syubhah"* (ambiguous relationship) as mentioned in sub-section (3).

Brunei: 68. (1) a man and a woman commited *zina* when both of them give consent to engage in sexual relations without legally married to each other and the intercourse is not categorised as vague (*syubhah)*.

These four coutries share the same definition that *zina* is a sexual relationship committed by a man and a woman not married to each other. However, they differ on the following. *First*, Pakistan and Brunei agreed that those sexual relationships occured on purpose, while Sudan and Malaysia did not; *Second*, Pakistan mentioned that penetration is an evidence that *zina* occured, and Sudan specifically regulated that penetration categorised as *zina* should be that the penis enter deeply into vagina, while Brunei and Malaysia did not specifically mentioned this detail in the definition. Third, Brunei and Malaysia specifically stated that *zina* does not include vague intercourse or (*wath'ie syubhah)*, while Pakistan and Sudan did not.

Similarities and differences among four countries are provided as follow:

> Pakistan: Whoever by words either spoken or intended to be read, or by signs or by visible representations, makes or publishers an imputation of zina concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm the reputation, or hurt the feelings, of such person, is said except in the cases hereinafter excepted, to commit qadzaf.

Sudan:

> **(١)**عد مرتكبًا جريمة القذف من يرمي كذبا شخصًا عفيفا ولو كان ميتا ،بالقول صراحة او دلالة او بالكتابة او بالاشارة الواضحة الدلالة بالزنا اواللواط او نفي النسب.**(٢)** يعد الشخص عفيفًا اذا لم تسبق اد انتهب جريمة الزنا او اللواط او الاغتصاب او مواقعة المحارم او ممارسة الدعارة.

(1) Categorized as committed qadzaf is a person accusing a chaste people, even a person who has died, using a clear saying, or writing, or clear implying, that he/she committing zina, liwath (anal sex) or erasing lineage relationship, (2) A person considered "afifah" (protecting self dignity), when he/she never committed zina, liwath (anal sex), rape, incest, or has never been pledged guilty of misbehaving.

Kelantan, Malaysia: 12. (1) *Qadzaf* is a fault of accusing someone to have committed *zina* without providing four witnesses, against a Muslim, mature, and welknown as innocent of *zina* offence.

Brunei: 95. Differ from that of the case of *li'an, "Qadzaf"* means accussation of committing *zina, zina bil-jabar (forced-zina)* or *liwat*, be it is by saying or written document, and fail to provide four witnesses against a Muslim Mukallaf who is welknown to be chaste from committing zina *zina, zina bil-jabar* or *liwat*.

The four countries share the same definition of *qadhaf* in that it is a false accusation of *zina*. However, they disagree in the following issues. *First,* providing the witnesses was not stated in definition provided by Pakistan and Sudan, while in Malaysia and Brunei codes it is stated clearly about the minimum witnesses for *zina*. *Second,* related to witnesses of *qadzaf* case: Sudan, Malaysia, and Brunei do not stateabout witnesses specifically in the regulation, while Pakistan mentioned in other regulation about witnesses that the witnesses should be from two Muslim and mature men and in the case that the person commited *zina* is unbeliever, the witness can be provided from unbeliever as well. *Third,* Brunei is the only country which mentions that false accusation of *zina* include *zina bil-jabar* (forced sex/rape), and *liwath* (anal sex). *Fourth,* Malaysia is the only country which does not state about the way of false accusation of *zina* can be in saying or in writing. *Fifth,* Pakistan does not provide limitation to the case of *qadzaf* against the wellknown chaste person from commiting *zina*, while three other countries do.

Disputes related to *hudūd* regulations appeared in many details cases, for example in the case of theft stated in the Qur'an, al-Maidah/5:38 as follow:

وَالسَّارِقُ وَالسَّارِقَةُ فَاقْطَعُوا أَيْدِيَهُمَا جَزَاءً بِمَا كَسَبَا نَكَالًا مِنَ اللَّهِ وَاللَّهُ عَزِيزٌ حَكِيمٌ

"*Laki-laki yang mencuri dan perempuan yang mencuri, potonglah tangan keduanya (sebagai) pembalasan bagi apa yang mereka kerjakan dan sebagai siksaan dari Allah, dan Allah Maha Perkasa lagi Maha Bijaksana.*" (QS. al-Maidah, 5:38).

Pakistan tidak menerapkan potong tangan sebagai hukuman bagi pencuri. Mer*As to the thef, male and female, cut off his or her hands: a punishment by way of example, from Allah, for their crime; and Allah is Exalted in power.*

Pakistan does not regulate cutting hands for theft, but amend it by maximum a lifetime imprisonment or paying compensation:

> Punishment for theft: Whoever commits theft shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Sudan, Malaysia, and Brunei regulate cutting hand for theft with different details.

Sudan:

(١)من يرتكب جريمة السرقة الحدية، يعاقب بقطع اليدا ليمنى من مفصل الكتف (٢)اذا ادين الجاني مرة اخرى ، يعاقب بالسجن مدة لا تقل عن سبع سنوات

(1) A thief who fulfilled the category of committing theft according to had (syariqah haddiyyah) should be punished by cutting the right hand from armwrist to its palm (2) When the person commited theft for the second time the punishment is imprisonment for a minimum of seven years.

Kelantan, Malaysia:

6. Whoever committed *sariqah*, except what is stated on section seven, should be given *hudūd* punishment in the following categories: (a) the first offender by cutting the right hand; (b) the second time offender by cutting the left foot; and (c) the consecutive offender by imprisonment as prescribed by the judge to make the offender realised the mistake and regretted.

Brunei:

a. For the first offender, by cutting the right armwrist;
b. For the second time offender, by cutting the left foot up to its ankle and,
c. For the third and following offender, by maximum imprisonment of 15 years.

Several basic differences related to theft regulation are: *first*, Pakistan did not approve the theft punnishment by cutting hand, while Sudan, Kelantan Malaysia, and Brunei did. *Second,* Sudan did not regulate cutting foot as a form of punishment for theft, while Malaysia and Brunei did for the second time offender. *Third,* for the second and consecutive offender, Sudan gives punishment of seven years imprisonment, while Malaysia and Brunei cut the left foot for the second time offender and imprisonment for the following time offender up to 15 years.

Although it is understood that *hudūd* is punishment prescribed by the Qur'an and Hadith, disputes on interpretation related to the implementation of that regulation occured. The above cases inferred that interpretation is based on the policy makers in each country which can influence the different regulation of each country. For example, in relation to the age of a person subjected to be punished under *hudūd* and on definition such as in the case of *zina* and *qadzaf*. Second,disputes in the form of punishment as stated in the Qur'an, in reality each country interpret it differently based on the agreed decision among the policy makers and the ruler of each country. For example, in the case of theft for the second and third offender,[165] Pakistan

165 Al-Qur'an only stated that the punishment for theft is by cutting hands, and it does not

does not practice cutting hands for theft, and Sudan does not regulate the cutting foot for theft like in Malaysia and Brunei.

Differences in drafting *hudūd* as mentioned above occured not only related to specific part *(furu'iyyah)*, but also to the main issues (*ushuliyyah)* such as the forms of crimes categorized as *hudūd*, definition of each crime as established by ulama under the category of *hudūd*. In addition, more differences will be found in each regulation of the countries. Thus, the crimes that have certain regulation in the Qur'an like *hudūd*, there is still available room for different interpretations in the main and detail issues, and in reality, the judge has the authority to decide which punishment should be implemented and which one should not, as seen above. What it is believed as prescribed by God and the Messenger still can be negotiated in its implementation and should not be strictly implemented.

Hudūd is a criminal regulation that has been discussed with different understanding since the classical ulama in its implementation. Furthermore, the different implementation as seen on the above mentioned countries of which implement *hudūd* show the possible compromise on its practice..

C. *Rajm* (Stoning to Death)

The validity of *rajm,* stoning a convict alive to death, has been a heated debate since classical Muslim scholars. However, up until now the practice of

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mention about cutting feet. It is in the hadith narrated by Imam Daruquthni which mentions about cutting foot for the third theft offender not the second time.as stated in Hudūd ordinace of Kelantan Malaysia and Brunei.

ةُدَيَ او عُطَقْافَ قُرِاسَّلا قَرَسَ اذَإ » لَاقَ -ملس و هيلع هللا ىلص- ىِّبَنَّلا نِع قَرَيْرَهُ ىبِأ نْع ةُلَجْرِ او عُطَقْافَ دَاعَ نْإِفَ ةُدَيَ او عُطَقْافَ دَاعَ نْإِفَ ةُلَجْرِ او عُطَقْافَ دَاعَ نْإِفَ »

(Ad-Daru Quthni, *Sunan ad-Daruquthni, v*. 8, p. 184. Other possibility is related to cutting feet is referred to the *had* for armed robbery *had hirobah* in which one of the punishment is by cutting foot (Qur'anic verse al-Maidah/5:33). However, if it is based on the hadith above, the question emerged whether this hadith can be used as a basis for *had* implementation that differ from that of stated in the Qur'an. Besides, If Kelantan and Brunei are followed this hadith why it is implemented for the second offender and not to the third as stated in the hadith? And if it is being connected with the *had* hirobah, these two crimes are regulated differently in the Qur'an.

rajm is still found in many Muslim communities, whether based on written rules and unwritten custom rules. Women Living under Muslim Law (WLUM) notes that this punishment has been practiced since the ancient times. The Greeks implement *rajm* for prostitution, adultery, and murder. The Jews, after the written law *Taurah* and the oral law *Talmud,* implement *rajm* for murder, blasphemy, and apostasy.[166]

Rajm is not recognized in the Qur'an, but the rule of law that endorses *rajm* is found in the hadith of the Prophet and the books of *fiqh*. As for the state legal system, *rajm* is increasingly prevalent in Muslim countries particularly from the late 20th century to early 21st century along with the rise of political Islam. Muslim communities implement *rajm* as a punishment for adultery in men and women who are married (*muhshan*). In *Mapping Stoning in Muslim Context*, WLUM notes that predominantly Muslim countries have done efforts to legalize *rajm.Rajm* itself has been implemented earlier on behalf of customary law.

Table1
Rajm in Muslim Countries[167]

No	Country	Condition
1	Afganistan	The state law does not recognize *rajm* except during the reign of the Taliban. However, the practice of *rajm* is customarily found and is still ongoing.
2	Brunei	The State recognizes the *rajm* in *Perintah Hukuman Kanun Jenayah Syariah*, passed in 2013 and became effective in 2014. Until now, the practice of *rajm* has not been found, either on behalf of state law or *adat*.

166 Mapping Stoning in Muslim Context, accesseed Desember, 23, 2014 from http://www.wluml.org/resource/mapping-stoning-muslim-contexts.

167 This table was compiled from *Mapping Stoning* with the addition of Brunei and refinement to Indonesia by the authors in accordance with the existing development at the time of this writing.

3	Indonesia	*Rajm* has been included in the proposed bill of *Qanun Hukum Jinayat* Aceh in 2009. Up to now, *Qanun* which has been passed does not contain *rajm*. *Rajm* was practiced by Ja'far Umar Thalib, commander of the Laskar Jihad, who stoned a follower named Abdullah in Ambon on March 27, 2001 due to a case of adultery.
4	Iran	*Rajm* has been recognized in the Islamic Penal Code of Iran up to now. Iran is wellknown as the country which does *rajm* the most in the world.
5	Iraq	*Rajm* is not recognized in the Iraqi Penal Code, but *rajm* is practiced with its association with the tradition of *honor killing*, the murder of those deemed have wounded family honor.
6	Malaysia	*Rajm* has been in *Enakmen Kanun Jenayah Syariah Negeri Kelantan* since 1993 and in *Enakmen Kesalahan Jenayah Syariah (hudūd and qishās) Negeri Terengganu* since 2002. But until now, these two enakmen cannot be applied to cases of *rajm* does not occur, either in the name of the law or customary.
7	Mauritania	Islamic Criminal Law has been applied in Mauritania since 1983. This law requires adulterers to be stoned. Nevertheless, the practice of *rajm* has not been found in this country.

8	Nigeria	Syari`ah penal code that includes *rajm* passed in 12 of 36 states of Nigeria during 1999-2001. There are many cases leading to *rajm* in the court, but so far executions by *rajm*, whether for legal or customary law, are not found.
9	Pakistan	*Rajm* is in the *hudūd zina* (Zina Ordinance) since 1979 but was amended in 2006 with the enactment of *the Protection of Women (Criminal Laws Amendment).* Although the process of proving adultery is tightened, but *rajm* still exists in the legal system of Pakistan. So far the practice of *rajm* in the name of state law is not found, but it is found in the name of customary law.
9	Qatar	*Rajm* is recognized in the legal system in Qatar. But no one has found a legal case that ended with *rajm*.
10	Saudi Arabia	The Saudi monarch doesn't have the Syari`ah Criminal Law. Legal decisions are handed over to the appointed *Majelis Shura*. They are given the right to impose sanctions, including *rajm* sentence. In the last ten years, the application of *rajm* is not found, but there are cases punishable by *rajm,* and then they are being relieved in other forms of punishment.

11	Somalia	*Rajm* is imposed only in the area of southern Somalia controlled by Muslim groups like al-Shabab and Hizbul Islam. They apply *rajm* to *muhshan* adulterers and homosexuals. *Rajm* is practiced in this area.
12	Sudan	*Rajm* is recognized in the Criminal Code since 1991 that apply nationally. *Rajm* is still recognized and practiced in this country.
13	United Arab Emirates	Legal System in the United Arab Emirates recognizes the *rajm*. There are several legal cases related to *rajm* in court, but few have actually ended up with *rajm.*
14	Yemen	Yemen Criminal Law recognizes *rajm* for adulterers *muhshan* and homosexuals *muhshan*. There are several cases related to *rajm* but they are ended up with other kinds penalty. So far the execution of *rajm* has not been found.

The table above shows some important aspects, namely the general awareness of policy makers in Muslim countries who formulate Islamic criminal law as the state law that *rajm* is an inseparable part of Islamic law. This means that *rajm* could be on the agenda of every movement in the formalization of Islamic Syari`ah. Although in some places *rajm* is not yet implemented, but the law allowing *rajm* exists so that the government or the people can use it at any other times. The more so, if the Muslims have practiced the *rajm* in the name of tradition. that could be a strong justification for the state to implement it any time soon.

Pakistan, Sudan, Malaysia, and Brunei are some examples of the countries that have the formulation of the rules on *rajm* in their Criminal Law.

Pakistan:

Whoever is guilty of *zina* liable to *had* shall, subject to the provisions of this Ordinance, -

(a) if he or she is a *muhsan*, be stoned to death at a public place; or

Sudan:

عقوبة الزنا :(أ) بالإعدام رجما اذا كان محصنا،

The punishment for zina is stoning to death for muhshan.

Kelantan Malaysia: 11. (1) Jika pesalah yang melakukan zina itu mohsan, maka pesalah itu hendaklah dihukum dengan hukuman rejam, iaitu dilontar dengan batu yang sederhana besarnya sehingga mati. [If the offender of zina is muhshan, s/he should be punish by rajm, that is stoning using medium size of stone to death].

Brunei:

a) jika dia mushan, direjam sehingga mati dengan disaksikan oleh sekumpulan orang Islam; [For married people, stone to death with the witness of a group of Muslim).

Zina Ordinance of Pakistan on *the Mode of Execution to Death* explains that *rajm* is started with the witnesses who have sworn that the convicted person has adultery pelting stones at the convict. While in the process, the convict may be shot. After the death of the convict, *rajm* and shooting must be stopped. A law journal explains that during the *rajm*, men that would be stoned are buried up to the waist, while women are buried deeper to prevent the stones to fall on their breasts. Women rarely ran away during the procession compared to men. This is why in Muslim countries fewer men stoned than women. If the convict escapes when stoned, he may be free.[168]

168 Sanaz Alasti, *Comparative Study of Stoning Punishment in the Religions of Islam and Judaism,* Justice Policy Journal, Volume 4 – No. 1 –Spring 2007, p. 19

It is natural in an unequal relationship that it has a tendency to spread unfairness on those who are in a weak or weakened position. Similarly, the neutrality of the legal system in unequal gender relations tends to regard women as the weaker party. That is, women as sources of temptation that have major influence in the case of *zina*, *qadzaf*, and also abortion, so that women are in vulnerable position in the implementation *qishās* and *hudūd*. In addition, there is a tendency in law enforcement everywhere, especially in countries with weak law enforcement, symbolized like a knife, sharp downward but blunt upward. *Rajm* in practice is implemented to a weak community who have no access to justice. Among them are the poor and women.

Different opinion substantially occured whether *rajm* is categorized as part of Islamic law or not.[169] It has been ongoing debate since classical times, however, its implementation as part of the Islamic criminal law in modern countries cannot be prevented, even in the new Islamic criminal law applied in Brunei in 2014. This means that understanding *rajm* as central part of Islamic criminal law is much stronger than otherwise.

D. The Vulnerable Position of Women

The setting to the arrangement of *hudūd* in modern times refers to the classical *fiqh*. The demands of times due to changes in the social system, politics, economics, law, and also the development of global ethics and human rights, including the Human Rights of Women, have led into the

169 One thing is certain that *rajm* is not typical of Islam, because long before Islam came *rajm* has been practiced by the previous divine religions and also the other great civilizations. In the analysis of the authors that there is no mention of *rajm* in al-Qur'an can be a very strong indicator that Islam wants to eliminate *rajm.* It is indeed very cruel and inhuman practice. Some scholars say that the *rajm* was included in Qur'anic kind of verses that denote *mansukh at-tilawah ma'a Baqa'i al-hukmi* (the recitations are abrogated while the laws remain). This theory is very strange, how comes a law whose text has been deleted be implemented? We do not deny some of the traditions of the Prophet still appreciate *rajm*. However, once again, according to the authors, the appreciation of the Prophet is a dialogue between civilizations of *jahiliyyah* (ignorance) and Islam which offers new values. Islam is about to remove the teachings of *rajm* gradually (*tadri*j), as the method of Islam in an effort to eliminate traditions contrary to the values of Islam as *rahmat* (blessing).

changing regulation in dealing with these two types of crime . One of the striking differences which exists between the paradigm of Islamic law and modern legal paradigm is the position of women. Gender equity and equality are the ethics of modern humans which up until now is being fought and has become part of the very fabric of modern civilization. Meanwhile, the classical Islamic law was formulated in Arabia in the medieval time where women were put in lower position.

Unequal gender relations causes gender injustice. There are five forms recognized as gender inequality, namely marginalization (through exclusion/ poverty), subordination (through being considered less important), stereotype or stigma (negative labeling), violence (both physical and mental) and the double burdens.[170] These five forms of injustice can occur in various aspects of life including the law. In the formulation of *hudūd* in Pakistan, Sudan, Kelantan Malaysia, and Brunei, it is found a form of gender inequality that puts women in a vulnerable position.

1. *Marginalization*

Marginalization or exclusion of women occurs in a clause which specifies that women cannot be a witness, both for crimes to others as well as to themselves such asin the testimony of *khamer*, adultery and *qadzaf* in Pakistan

> Proof of drinking liable to had.The proof of drinking liable had shall be in one of the following forms, namely:-
>
> (a) at least two Muslim adult male witness, about whom the court is satisfied, having regard to the requirement of *tazkiyah al-shuhood*, that they are truthful persons and abstain from major sins (*kabair*), give evidence of the accused having committed the offence of drinking liable to *had*.

170 Mansour Fakih, *Analisis Gender dan Transformasi Sosial* (Yogyakarta: Pustaka Pelajar, 1997), pp. 12-23.

Proof of *zina* liable to *had* shall be in one of the following forms, namely:-

(b) at least four Muslim adult male witnesses, about whom the Court is satisfied, having regard to the requirements of tazkiyah al-shuhood, that they are truthful persons and abstain from major sins (*kabair*), give evidence as eye-widnesses of the act of penetration necessary to the offence:

Enakmen Kelantan Malaysia, in the ordinance *khamer, adultery, and qadzaf*, the same as Pakistan also exclude women as witnesses:

(The terms of a witness: (1) witness is a man who is *Aqil baligh*, Muslim, and fair. (Malaysia, Courant III Section 41)

The rules that ignore women's testimony can result in inability of women to be witnesses to the crimes of *hudūd* regardless of their number. For example, women, in any number, cannot be witnesses to the crime of *khamer,* even when its consumption has caused mischiefs. Similarly, women in any number cannot be witnesses to the rape occurr in a girls' dormitory although all the occupants see it. The same thing can happen to any woman where she cannot bear witness to the rapes that happened to her mother or her aunt, though she may see with her own eyes, nor can she be a witness to the rape upon herself. Women are deprived of their right to save themselves and women experiencing violence, whether physical, sexual, and others, as set forth in *jinayat* Islamic law in Pakistan and Malaysia.

2. *Subordination and stigmatization*

The assumption that the value of women is less important than men appears in the rules about women's testimony which is considered half of men.

> Brunei: Evidence of Qatlu Syibhil-'Amd that may be imposed diyat must be in ways that follows: (a) a pledge of the accused who confesses guilty willingly before the Court which has authority; (b) Syahadah of two male witnesses; (c) Syahadah of one male witness and two female witnesses; (d) Syahadah of one male witness and oath of the complainant (Part 141, as well on evidence of Qotlul-Khatha' in the part 148).

> Brunei: If Shahid comprised of a man and two women, and one female witness withdraws her testimony, she must pay compensation one quarter of the losses incurred by mahkum 'alaihi, and if both of the female witnesses withdraw their testimony, they must pay compensation half the losses incurred by mahkum 'alahi, and if the male witness withdraws the martyr his testimony, he must pay compensation half the losses incurred by mahkum 'alaihi (Section 185, Explanation 3).

That the value of woman's testimony is only half of men have ignored the fact that in modern states there are a lot of women whose authority is recognized by the state as judges in civil and criminal cases. This rule could lead to an occasion where a competent female judge in civil court whose testimony may later be recognized only half of the man who knows nothing about the law in Syari`ah court.

Rules about the value of women's testimony as these contain negative outlook (stigma) that women are not capable to become a witness, even more in the criminal field. This stigmatization is certainly unacceptable when there is a fact that a woman is able to study law in college and even become a professor in the field of law, and hold a career as a professional judge whose authority is recognized. Rules containing the subordination of women are also found in the level of *diyat. Diyat* paid on women is half of men because of the pain borne by a family who lost a man who is considered more severe than the one who lost a woman.

3. Violence and Double Burdens

Rules that can lead to violence and double burden on women, among others, are when adultery is not differentiated from rape. Pakistan insists that

zina (adultery) is consensual (wilfully), not coercion (*bil-jabar*). Adultery included in the category of coercion in four conditions: if it goes against the wishes of the victim, not recognized by the victim (e.g. hypnotized or drunkard), under the threat of murder or hurt, or fraud (e.g., offender knows the marriage is not valid but he can convince the victim to believe that it is valid). Sudan has also a provision explicitly distinguishes between *zina* and adultery with rape (الإغتصاب). The conditions of *zina* (and also sodomy) considered as a rape الإغتصاب are only two, namely without the willingness of victims (*duna ridla*), or being forced because of strength and power of the perpetrator.

Brunei also distinguishes between adultery and rape (*zina bil-jabar*) with six conditions. It is a rape; if it is contrary to the willingness of the victim, if it is without the willingness of the victim, if the victim is threatened to be killed or harmed, if it is in fraud, if the victim is disabled or drunk, if the victim cannot understand the situation or because the victim is not yet *baligh* or underaged.

Malaysia doesnot distinguish between adultery and rape. Some of the conditions in Pakistan and Brunei which are in the category of rape (*zina bil-jabar*) are in the category of *wati syubhah* in Malaysia.

Wati syubhah is an intercourse which is performed by a man with a woman who is not his wife and intercourse is done:

(a) In dubious circumstances in which he thought that the woman is his wife, while she in fact not; or
(b) In dubious circumstances in which he thought that his wedding with the woman was legitimate by the law of Syari`ah, while in fact not.

The condition without firm differentiation between adultery and rape in *jinayah*Syari`ah may contain the potential violence to woman, because even when four witnesses required are presented before the court, she would still be charged with the punishment of adultery, *rajm* if she is married or whipped 100 times if she is not married . Moreover, if she is not able to bring witnesses, she would be stoned if she is not married, whipped 100 times if she is not married for committing adultery, whipped 80 times for

committing *qadzaf*, or whipped 180 times for committing adultery while she is not married altogether with *qadzaf*.

The case of Zarfan Bibi in Pakistan and Bariya Ibrahim Magazu in Zamfara, Nigeria, are blatant examples about this.

> When her husband was jailed for murder, her brother in-law repeatedly raped her resulting in her pregnancy. She reported the crime of rape and in the end was brought to trial on charges of adultery. While the rapist was free of charge because of insufficient evidence, Zarfan was sentenced by court in April 2002.[171]

> In September 2000 in Zamfara, a 17-year-old pregnant girl, Bariya Ibrahim Magazu, who reported her rape, was sentenced to 180 lashes for committing and Qadzaf. This ruling was executed on January 9, 2001, after Bariya gave birth to a baby.[172]

Zarfan Bibi and Baria Ibrahim Magazu experienced double burdens in the form of the assumption that the victim was not innocent, therefore the victim was once again being sacrificed (this is re-victimization). They both bear the brunt of sexual relationship they did not want (the rape), pregnancy, and whipping even *rajm*. While perpetrators of the rape remain free because the rape generally occurs in a quiet place so that the proving procedures are difficult to meet. They can freely repeat the same actions to the other new female victims who may not be aware of the danger of rape.

The difficulty to provethe rape also causes woman to remain in a vulnerable position to violence despite being in a country that sharply distinguishes between adultery and rape. This difficulty happens because of so many reasons, among them:

171 Taufik dan Samsu, *Politik Syariat Islam,* p. 146.

172 Taufik dan Samsu, *Politik Syariat Islam,* p. 130.

1. Proof is charged against the victim and not to the perpetrator. Rape victims in general are in a traumatic psychological condition making it difficult to testify, let alone find a witness.
2. Victims of rape, since women's testimony is not recognized, or acknowledged only half of that of men, so that female witnesses are not adequate in front of the judges compared to four male witnesses.
3. Rape should be determined by post mortem visum by medical doctors. However, in practice many physicians only come to the description of injury, without further assessment that the injury might have occurred as a result of force or rape.
4. The threat of punishment to *qadzaf* (false accusation of *zina*) makes rape witnesses afraid to give their voice, so they choose silence in order to be safe.
5. There is a stigma about woman in general as a teaser so that a rape victim is not believed to have suffered rape, but being regarded as having consensual action, even if the active one is actually the man.

The rules about adultery and *qadzaf* are rules that relate directly to gender relations. Under the rules, it is clearly seen how the perspective of society, the state, and religious leaders, influences the weak position of women in law. Patriarchal traditions that exist everywhere must be wary in the application of the law, including religious one.

If we look at the implementation of *hudūd* in the modern state, we can see the trend is generally referring to the formulation of classical *fiqh*, which of course in the end also refers to the Qur'an and Hadith. Despite the span of time between classical scholars and the Prophet, differences in social context are not that sharp as in this modern era. For example, gender relation in the Middle East, especially Saudi Arabia, in some respects has shifted, but in general, particularly in public spaces, the shift is still not as fast as in other Muslim countries. In Indonesia, for example, many women have become judges in religious court, besides of course in general court. Meanwhile, given the position of women in classical *fiqh*, in reference to the implementation of *hudūd,* it seems improbable that they may be elected as

a judge becausethe value of women's testimony was only regarded as half of that of man in civil cases, and in criminal cases women's testimony was not accepted. Gender relation as notion presumed earlier before the formulation of *hudūd* is significant challenge in the implementation of *hudūd* in modern countries, particularly the countries that already have, or head towards, fair and equal viewpoints pertaining men and women.

Indonesian Constitution views that every citizen, either man or woman, is equal before the law. There are at least 40 types of the constitutional rights of every citizen of Indonesia, for both men and women, distributed in 14 clusters, namely the right to a nationality, the right to life, the right to develop themselves, the right to freedom of thought and freedom of choice, the right to information, the right to work and to a decent living, the right to property and housing, the right to health and a healthy environment, the right to a family, the right to legal certainty and justice, the right to be free from threats, discrimination, and violence, the right to protection, right to fight rights, and the right to rule.

Equality of gender relations in the Indonesian Constitution in more detail contains in:

1. The right to legal certainty and fairness which include: the right to recognition, security and the protection and legal certainty on Article 28 D (1), the right to equal treatment before the law on Article 28 D (1), Article 27 (1), and the right to be recognized as a person before the law under Article 28 I (1).
2. The right to be free from threats, discrimination, and violence which include the right to feel safe and being protected from the threat of fear to do something which is a fundamental right in Article 28 G (1), right to freedom from torture or degrading treatment to humanity at Article 28 G (2).
3. The right to be free from discriminatory treatment on any basis in Article 28 I (2), the right to have the ease and special treatment to obtain the same opportunities and benefits in order to achieve equality and justice in Article 28 H (2).4. The right to protection which includes the right to protection of self, family, honor, dignity, and property under

one's possession in Article 28 G (1), the right to protection against discriminatory treatment under Article 28 I (2), the right to the protection of cultural identity and rights of indigenous people in accordance with the times and civilization at Article 28 I (3), the right to protection from violence and discrimination in Article 28 B (2), Article 28 I (2), the right to asylum politics of other countries on Article 28 G (2).[173]

4. Constitutional guarantee of the Republic of Indonesia as stipulated in the 1945 Constitution affirms that Indonesia holds the view of equality between citizens of both men and women in various fields including in the field of law. Therefore, it is important to see how the Islamic criminal law applied in Aceh as one of the provinces in Indonesia which has referred to the formulation of classical *fiqh* in their provincial regulations.

Sisters in Islam (SIS) Malaysia notices the vulnerable position of women and non-Muslims in Islamic criminal law applied in Kelantan. This vulnerable position could actually occur in the application of Islamic criminal law in a modern country that embraces the democratic system. The vulnerable positions of women, among others, are in the pre-assumption of adultery which occurs in the community, women not being recognized as witnesses, dissolution of marriage through oath of *li'an*, the value of *diyat* compensation for women who were murdered.[174]

E. Contestation of Islamic Criminal Law in Aceh

A wave of the implementation of Islamic criminal law has arrived in Aceh Province, Indonesia. According to historical records, the Acehnese have practiced the teachings of Islamic Syari`ah since the days of empire. Even

173 Komnas Perempuan, *Buku Saku 40 Hak Konstitusional Setiap Warga Negara Indonesia dalam 14 Rumpun,* accessedat July 8, 2015 from http://www.komnasperempuan.or.id/2014/01/buku-saku-40-hak-konstitusional-setiap-warga-negara-indonesia-dalam-14-rumpun/

174 Rose Ismail *(Editor)*, *Hudūd in Malaysia the Issue at Stake* (Kuala Lumpur: SIS Forum Malaysia, 1995), p. 7.

in the Dutch colonial times, the Islamic Syari`ah was applied and believed to be capable of burning spirit of war against colonialism. Significant developments occur after the reform. Through the Act Number 44/1999 on the Implementation of Provincial Specialization of Aceh, it was confirmed four specialization in organizingreligious life, Adat indigenous life, education, and the role of Islamic scholars in the establishment of the regional policy.[175] This Act gives the spirit of privileges to Aceh, but it does not give the spirit yet to the implementation of Syari`ah law formally as it is now.

The spirit of Syari`ah law appeared formally in Aceh three years after the passing of the Act Number 18/2001 on Special Autonomy for the Special Province of Aceh as the Province of Nanggroe Aceh Darussalam. This Act provides opportunities for the emergence of local regulations of Islamic Syari`ah through Chapter XI of the Syari`ah Court of Nanggroe Aceh Darussalam Article 23, as follows:

(1) The Court of Islamic Syari`ah in Aceh Province as part of the national judicial system is undertaken by the Syari`ah Court without intervention from any other sides.
(2) The authority of Syari`ah Court as referred in clause (1), is based on the Islamic Syari`ah inside the national legal system, which is further stipulated by *Qanun* of Nanggroe Aceh Darussalam.
(3) The authority referred to in clause (2) is applied to the followers of Islam.

After this bill was passed, Aceh in the same year passed Perda (*Peraturan Daerah*, regional legislation) Aceh No. 11/2001 on the Implementation of Islamic Syari`ah in all fields of *Aqidah* (faith), *Ibadah* (worship) and *Syiar* (symbols) of Islam. Back then the term *Qanun* had not been used. It was not until two years later passed successively *Qanun* of Aceh Province Number 12 Year 2003 on Alcoholic Beverages and the like, *Qanun* of Aceh Province Number 13 Year 2003 on *Maisir* (Gambling), and *Qanun* of Aceh Province Number 14 of 2003 regarding *Khalwat* (immorality). There are

175 Act Number 44/1999 on the Organization of the Specialness of the Province of Aceh Part One *Clause* 3 paragraph (2)

seven Syari`ah-based *Qanun*s which have been designed, namely *jinayat*, tax, finance, and principles of Islamic Syari`ah, education, employment, and the establishment of the Aceh Syari`ah bank. Four of the seven draft of the *Qanun* (called *Rancangan Qanun,* abbreviated *Raqan)* are ratified by DPRA (*Dewan Perwakilan Rakyat Aceh*, Acehnese House of Representatives).[176] One among them is *raqan* on *jinayat* law.

Raqan of *Jinayat* law of Aceh is a further development of the Aceh Provincial *Qanun* of Islamic Law which had passed earlier. One form of punishment mentioned in every *Qanun* is flogging.[177] Draft *Qanun* in Aceh in 2009 on *Jinayat* law has been passed by the Aceh on 14 September 2009. However, this was not enough for a *Qanun;* it must also be approved by the government, in this case the Governor. *Raqan* includes violations of Islamic Syari`ah in the form of drinking *khamer* (liquor), gambling, *khalwat* (being with another not a *mahram* in locked places), *ikhtilath* (making out in either the open or closed place), adultery, sexual harassment, rape, *qadzaf* (accusing someone of adultery without four witnesses), *liwath* (homosexuality), and *musahaqah* (lesbianism).[178]

Raqan also stipulates penalties (*uqubat*), either in the form of *hudūd* (based on the Qur'an and hadith), and *ta'zir* (based on the judge's decision):

a. Flogging
    1. *Khamr*: 20 strokes for selling/buying, carrying/transporting, offering *khamer* and involving children; 40 times for drinking *khamer* (*hudūd*); 80 times for those who produce, stockpile/store, promote, and import.
    2. *Maisir*: 60 strokes for those who perpetrate it; 120 times to those who organize or promote it, and involve children; plus 1/3 the number

176 Suara Redaksi, 'Perlu Kontrol Masyarakat agar "Qanun Islami" Diimplementasikan', *Suara Darussalam,* Edition VI, 2, 2014, p. 3.

177 Mohd. Din, *Stimulasi Pembangunan Hukum Pidana Nasional dari Aceh untuk Indonesia*, (Bandung: Unpad Press, 2009), p. 38.

178 Nurun Nisa, *Qanun Jinayah NAD Disahkan DPRA,* Monthly Report on Religious Issue, The Wahid Institut, Edition 23, October 2009.

of whip if the offender is a corporation owner in which the staff is whipped.

3. *Khalwat*: 10 strokes for conducting or promoting *khalwat*, 20 times for involving children over the age of 12.
4. Fornication: 100 strokes for unmarried (*hudūd*)
5. Sexual harassment: the person who did it is flogged to 60 strokes; 120 strokes if victims are children.
6. Rape: 100-200 strokes for those who do so, adultery with children is considered rape and being punished with the same punishment; 100-400 strokes if a rape victim is a child.
7. *Qadzaf*: 80 strokes for those who do so (*hudūd*).
8. *Liwath* and *Musahaqah*: 100 strokes for those who do and 80 strokes for those who promote it; 200 strokes for those who are involving children.

b. *Rajm* for adulterer *muhshan*

In accordance with the crimes regulated, *Raqan Jinayat* Aceh Law of 2009 doesn't include *qishās* as a punishment for murder or physical wounding, and cutting off hands as punishment for theft. Nonetheless, this draft contains a controversial Article, i.e. *Rajm* in Part Five of *zina* Article 24 clause 1.

> (1) Any person who knowingly commits adultery is threatened with *uqubat hudūd* one hundred (100) lashes for the unmarried and *rajm uqubat*/death penalty for those who are married.

The above Article becomes serious obstacle for Aceh government to sign it up until now. According to the governor, *rajm* cannot be implemented unless the general public is given the understanding of the teachings of Islam, in addition to socio-economic influences that may arise from the implementation of *rajm*.[179]

179 NurHadi, *Penegakan Hukum Jinayat di Provinsi Aceh: Problematikan dan Tantangan,* accessed from http://www.badilag.net/data/artikel/penegakan%20hukum%20Jinayat%20Di%20Provinsi%20Aceh,%20Problematika%20dan%20Tantangan.pdf May 3, 2014.

Legal *Raqan Jinayat* Aceh of 2009 is then revised by *Raqan Jinayat* Law of 2014. The arrangement of crime types is the same as the *Raqan Jinayat* Aceh of 2009, namely *khamer*, *maisir, khalwat, ikhtilath, zina,* sexual harassment, rape*, qadzaf,* sodomy, and *musahaqah*. A significant change that occurred was the elimination of *rajm*. Nevertheless, the agreement between the provincial parliament and the government still runs pretty tough to finally being passed on October 23, 2014 under the name of *Qanun* Aceh No. 6 of 2014 on the *Jinayat* Law.

Qanun in Aceh in general has been harshly criticized because it differs and in contradiction to the spirit of the civilized humanity in the 1945 Constitution since it contains flogging as punishment. *Qanun* of 2014 still receives a lot of criticism such as Article 36 which says that women who are pregnant out of wedlock cannot be accused of committing *jarimah zina* without the support of sufficient evidence. At first glance, this Article gives protection to women because pregnancy is not a direct evidence of adultery, but can also be evidence of rape. However, in practice, pregnancies outside marriage tend to be judged as a result of adultery rather than rape for several reasons:

1. Rape is generally done in a quiet place so it is difficult to find witnesses,
2. Rape victims in general suffer from psychological shock which makes it difficult for pursuing the legal process,
3. Although theoretically the post mortem visum by doctor can be used as evidence but the problem is that doctors are reluctant to provide the autopsy report to confirm that there has been a rape,
4. The existence of a negative view of women as a teaser or a source of *fitnah*,
5. There is an opportunity for the perpetrator to be free by swearing five times to reject the allegation, and then he might be released as set in Section Seven of Rape section 48 up to 56.

Aceh Monitoring Network 231 (231 JPA) presented a note on Aceh *Qanun* No. 6 of 2014 on the Law *Jinayat* in the National Forum organized by Komnas perempuan in November 2014 related to its substance, namely:

1. Contrary to the following higher laws:

a. Child Protection Act (23 of 2002): Children are entitled to protection from inhuman treatment.
b. Juvenile Justice System Act (11 of 2012): Children aged less than 14 years cannot be imposed to imprisonment.
c. KUHP/Kitab Undang-Undang Hukum Pidana (the Criminal Law Act): different regulation forthe crimes of *zina* and rape
d. CEDAW (Law No. 7 of 1984): it should make sure that there is no discrimination based on gender.
e. The Human Rights Act (Act No. 39 of 1999): The State is obliged to fulfill the human rights of its citizens.
f. Anti-Torture Law: a punishment should not degrade the dignity and status (public humiliation).
g. Elimination of Domestic Violence Act (Act No. 23 of 2004): recognizes sexual violence in the home (marital rape).

2. Contrary to the principles of the law
   a. Special rules may override the general rule: This principle can only be applied to the same level of policy and regulates similar substance. The level of *Qanun* is lower than the Act (KUHP and other laws). *Jarimah,* as set forth in this *Qanun,* is also regulated in the Criminal Code or the criminal provisions outside the Criminal Code. What is applicable, however, is the rule of *jarimah* in this *Qanun* (Article 72 of the *Qanun Jinayat*).
   b. The principle of criminal liability: Only the person who is the subject of law which can be held criminal liability, but in Article 10 of the *Qanun Jinayat* there are provisions which include the parties threatened, pressured and controlled by other forces as punishable: Someone who did *jarimah* is not subject to *uqubat* because:
      1) Forced by the threat, pressure, power or force that cannot be avoided, unless such actions may harm others; and/or
      2) At the time of *jarimah* the perpetrator suffers mental disorders, mental illness or mental retardation, unless such actions harm others

c. The principle of equality before the law: everyone is equal before the law. However, in Article 9 it is stated that the officers carrying out duties or orders from superiors in accordance with the regulations of law cannot be subject to *uqubat*.

3. Inconsistency between the principles and the substance of the provisions in the *Qanun*. For example, in Article 2 *Qanun Jinayat* establishes a principle in the implementation of law *jinayat,* namely, Islamicity, legality, fairness and balance, welfare, protection of human rights, teaching and learning involving the community (*tadabbur*). However, the provisions of its Articles revealed many provisions that are contrary to these principles. For example, Article 28 clause 3 states that there is no obligation for investigator to find out who is the perpetrator/a partner of those who voluntarily confess of doing *jarimah*.
4. The implementation of *Qanun* on non-Muslims. Article 5 section c states that *Qanun* is applicable for every Muslim who commits *jarimah* in Aceh, non-Muslims who commit *jarimah* in Aceh together with the Muslims and choose voluntarily to be the subjectof law *Jinayat*, non-Muslims who commit *jarimah* in Aceh which is not regulated in KUHP or the criminal provisions outside KUHP, but it is regulated in this *Qanun*, and corporations that carry on business in Aceh. Meanwhile Article 3, clause 2: what is regulated in *Qanun* is *khamer* (liquor), *Maisir* (Gambling), *Khalwat*, *ikhtilath, Zina*, sexual harassment, Rape, *Qadzaf, Liwath* and most *jarimah* regulated in *Qanun* are not regulated in KUHP. This means that non-Muslims would be subject to the provisions in this *Qanun*.
5. Revictimization of victims, the act of putting people who have become victims in a position that is not fair which might cause him or her receive double punishment. For example, Article 40 clause 6: a person who admitts of committing adultery and request to be sentenced would receive *Had* 100x flogging and the judge will order the detention for the implementation of the flogging to occur. This means, in addition to flogging, the person is also detained. Similarly, the rule that the victim must provide evidence is also another form of revictimisation because this actually should become the responsibility of the investigator. If the

perpetrator denies the accusation of the victim, the victim is required to present at least four witnesses who see the act of adultery while it occurred (Article 43 clause 2). Every person who claim to be raped can file a complaint to the investigator about the man who raped her by attaching initial evidence.

6. The impunity of the perpetrators. *Qanun Jinayat* creates opportunity of impunity for perpetrators that cause the victims to do much effort to get protection and justice in the form of:
   a. Perpetrators can deny the rape allegations through the oath as well, and after 5 time-vows, the perpetrators would be freed from the rape allegations.
   b. The suspect not only can be free from the punishment but also can demand restitution from the plaintiff/victim.
   c. Non-Muslim perpetrator may choose this mechanism (with greater potency of freedom compared with KUHP).
7. The criminalization of victims, that is, the act of adding a new crime to the victim for his or her efforts in finding justice appears in the following rules:
   a. Female victims of sexual exploitation who cannot bring four witnesses who see when sexual intercourse occurred, would undergo penalty twice, first as persons who commit adultery and second as those who accuse people of fornication (*Qadzaf*).
   b. Victims of rape can enrich evidence by filing a supplemental oath as evidence (Article 52 clause 3), if the victim cancels to swear in front of the judge, then he or she is considered to have done *jarimah qadzaf* and would be flogged 80 times (Article 54).
8. Contrary to the spirit of child protection in the form of:
   a. Ignoring unequal relationships between children and adults. For example:
      1) Any person who intentionally does *jarimah ikhtilat* with *children aged over 10 years* are subject to *uqubat takzir* maximum 45 times of flogging/450 grams of gold/45 months in prison (Article 26).

2) Any adult who commits adultery with children is subject to 100 times of flogging and can be coupled with the maximum of *uqubat takzir* 100 times of flogging/1000 grams of gold / 100 months in prison.
3) Any person who intentionally does *jarimah ikhtilat* with children aged over 10 years is subject to *uqubat takzir* maximum 45 times of flogging /450 grams of gold /45 months' imprisonment (Article 26).
4) Any adult who commits adultery with the children is subject to 100 times of flogging and can be coupled with maximum *uqubat takzir* 100 times of flogging/1000 grams of gold/100 months' imprisonment (Article 34).
5) Any person who does *liwath/musahaqah* with children other than being punished 100 times of flogging/1000 grams of gold/100 months in prison can also be added with 100 times of flogging/1000 grams of gold/100 months' imprisonment (Article 63 clause (3) and Article 64 clause (3)).

b. Ignoring the Act of Juvenile Criminal Justice System which emphasizes that efforts of diversion in the settlement of the case should be made for children who become the perpetrators,; children under the age of 12 years should not go to court, and children aged less than 14 years should not be subject to imprisonment. Meanwhile in *Qanun,* it is mentioned that if children who have reached the age of 12, not yet reached the age of 18 or unmarried commit *jarimah*, then they may be subject to *uqubat* at most 1/3 of *uqubat* predetermined for adults and /or should be returned to their parents/guardians or else put in places provided by the government of Aceh or the district/city (Article 67 clause 1).

9. Mixing between *jinayat* law and family law which lead to the break up of marriage as follows:
   a. Husband/wife who accuses his or her partner of committing adultery can complain to a judge and proves his or her allegations under oath (Article 59).

b. Husband/wife being accused can defend himself or herself by an oath as well (Article 61 clause 1).
c. When a husband/wife being accused is unwilling to swear, he or she would be punished because it proved *zina* (100 times of flogging) (Article 61 clause 3).
d. When a husband/wife being accused is not willing to swear, then he or she would be punished for accusing people of committing *zina* (*qadzaf)* by being flogged 80 times (Article 61 clause 4).
e. When both the accuser and the accused swear then they are released from punishment of *adultery* and *qadzaf* (61 clause 5), but they must break their marital relationship for good (Article 62).

Flogging or whipping in Aceh has been practiced before *QanunJinayat* Law of 2014 passed, based on the previous *Qanuns* including *Qanun* Aceh Province No. 12 2003 on *khamr*, *Qanun* Aceh Province No. 13 on *Maisir*, and the Province of Aceh *Qanun* No. 14 of 2003 on *khalwat*. Whipping was carried out, among others in the mosque courtyard of *ar-Risalah* Mosque Banda Aceh on Friday, 19 September 2014, for eight men who violate the ban on *maisir* (gambling).[180]

Execution of whipping has also been done in the case of the alleged *khalwat* of Y (a widow aged 25 years) and W (a man aged 40 years old). The house Y and W was raided by eight young men in a village in the District of West Langsa in the city of Langsa in Aceh. W was beaten and then tied up in a room and Y was raped in turns by those in the other room. This execution is controversial because the legal procedures ignore the condition of Y as a victim of rape (gang rape). Ibrahim Latif, Head of Islamic Syari`ah Langsa was adamant that Y should be flogged, and the fact that Y had also been raped doesn't need to be taken into account for the following reasons:

180 Main Report *Uqubat Cambuk untuk Mendidik, bukan Menghinakan Manusia,* Suara Darussalam Edition VI Year 2 2014 p. 10.

> "They have violated Islamic Syari`ah Qanun of khalwat. They must be processed in a form of justice. As for the perpetrators of rape and sexual harassment on Y should be processed under the national criminal law," said Ibrahim.

Like in other countries, the dynamics of law enforcement of *jinayat* in Aceh show an ongoing contestation. *Jinayat* law originally spread over multiple *Qanun* of *khamer*, *khalwat* and *maisir*. Then there was an attempt to collect all *Qanuns* in one *Qanun* called *Qanun Jinayat* Law by adding seven forms of *jarimah*, namely *ikhtilath, zina*, sexual harassment, rape, *qadzaf,* sodomy, and *musahaqah*, and a form of punishment was added, namely *rajm* as indicated on *Qanun Raqan Jinayat* Aceh in 2009. This *Raqan* was later being revised by eliminating *rajm*. The dynamics continued long enough to obtain an agreement between the provincial parliament (Dewan Perwakilan Rakyat Daerah, abbreviated DPRA) and the Governor of Aceh in 2014. The political atmosphere has contributed quite strong in this process considering the ratification of a *Qanun* in Aceh always occurs prior to the tenure of Aceh Parliament about to end.

Criticism directed at Aceh *Qanun* No. 6 of 2014 on the *Jinayat* Law, particularly on the rules relating to women and children, indicates a fairly wide gap between the perspectives on gender relations adopted by *Qanun* and the Constitution of the Republic of Indonesia.Chapter Five

Some Reflections On The Application Of Hudūd

The implementation of *hudūd* in many Muslim countries today certainly has political contexts, which are different from that in the times of the Islamic caliphate or in the time of the Prophet. Different social context give rise to different motivation and orientation of its enactment by authorities as well as different impact on the Muslim community. Although the *hudūd* punishment is believed to be directly set by Allah and His Messenger, but it is found that the interpretations on *hudūd* in the ordinance or law of *qanun jinayat* are varied from time to time. This chapter is a reflection on the implementation of *hudūd* in modern Muslim countries related to its process from formulation, approval, to implementation.

A. The Dominant Motives

Waves of *hudūd* implementation in the present day have a close connection with the struggle among groups for power in a post-colonial state. The struggle for influence between the modernist and conservative Muslims occurred in almost all Muslim countries. Modernist-socialist group wants the state to be colored with Islamic values without having to accentuate its Islamic identity. On the other hand, the conservative-Islamist group believes that Islamic identity should be affirmed to distinguish between Islamic and non-Islamic identity.

Colonialism that lasted long accrues to animosity of all considered western, since trauma of its atrocities has not yet been recovered. In some places, this is compounded by ethnic tension or drawn-out civil war for power. This situation adds to a sense of insecurity and fosters implementation of Syari`ah which has long been believed to be a path to success in the world and the hereafter. This longing for 'true" Islamic identity has intensified into

something very potential to reap the support of the Muslim community. It has then received its full face through the emerging concepts of Islamic country, Islamic party, Islamic economy, Islamic education, and Islamic Criminal Law where *hudūd* is developed.

Power struggle going on in Muslim countries after the end of colonialism takes place in a democratic peaceful manner up to a bloody coup. In Pakistan, for example, a change of leadership in the country is often tinged with a coup. Overthrows from General Iskandar Mirza by Ayub Khan in October 1958, from Ayub Khan by General Yahya Khan in March 1969, from Zulfikar Ali Bhutto by Zia-ul Haq in 1977, and from Nawaz Sharif by Parvez Musyarraf in October 1999, are illustrations to point out. Likewise, the situation occurred in Sudan. The country's succession is often marred by a bloody coup. For example, from Ja'far Numeiry to General Abd Rahman Suwar adh-Zahab on April 5, 1985, and of Sadiq al-Mahdi to General Omar al-Bashir in 1989. In the middle of this power struggle, Islamic criminal law came into force in Pakistan in the year 1979 and in Sudan in 1983.

The debate over giving the meanings of Islam as the country's identity continues today in Muslim countries. Modernists demand Islam to be closer to the spirit of the original and the spirit of modern times as in Muhammad Ali Jinnah and Muhammad Iqbal in Pakistan, or Islam is more focused on the application of Islamic values and not Syari`ah law, particularly concerning the Islamic criminal law, as promoted by the party UMNO (the United Malays National Organization), the main party in Malaysia.[181] However, a group of conservative Muslims in Pakistan has the opposite view; they say that Islam should be oriented to the past in the formulations of Islamic history or make God's law as the sovereign law by way of its application in the law as a whole, as required by the PAS (*Parti Islam se-Malaysia*) in Malaysia .

Changes in the name of the state, between the Islamic Republic of Pakistan and Republic of Pakistan, indicate the pull strength between the modernists and conservative Muslim in Pakistan. Similarly, the change happened in the

181 Taufik dan Samsu, *Politik Syariat Islam*, p. 138.

hudūd ordinance degrading non-Muslim's and woman's testimony in judicial proceedings of 1979 in which some parts of the ordinance are subsequently amended through *the Protection of Women (Criminal Laws Amendment)* of 2006. Something similar happened to *Enakmen kanun Jinayah Syariah* passed in 1993 in Kelantan state, Malaysia, promulgated by PAS but until now this Qanun cannot be applied because it is considered to be contrary to federal law controlled by UMNO. *Qonun Jinayat* Law of Aceh received a similar fate. This *Qanun* Aceh was passed by Parliament in 2009, but was rejected by the Governor of Aceh until it became ratified in 2014 with changes according to the agreement.

The application of Islamic criminal law in Sudan has been dramatic when Ja'far Numeiri's regime that ruled for 16 years (1969-1985) took power after a military coup. Originally known as secular nationalist regime, at the end of his reign he suddenly became Islamist. On 8 September 1983 Numeiry issued a presidential decree that enforces Islamic Syari`ah as the only law in Sudan. More than 20 policies, laws and regulations formulated in haste were announced by Numeiry every week in the media. This change is considered due to the increasing strengthening of Islamic revivalism, the potential for political opposition, as well as the desire to control and cooptation of these forces in Sudan.[182] One of them is the *Qanun al-Uqubat* of 1983 governing cases of theft, robbery, *khamer*, adultery, *qadzaf*, and apostasy, which introduces specific sanctions as punishment of hand amputation, flogging and stoning.

In many Muslim countries, the rights to legislate are in the hands of parliament with representatives of political parties, either of nationalist, secular, or of Islamic. Representatives of Islamic political parties in the parliament do not necessarily have a background in Islamic studies, in particular the law of Islam, even more representatives of secular nationalist parties. Yet it is they who have the right to formulate and approve laws including what are related to the Islamic penal code. The same thing happened to the executive branch which is more political institution and

182 Taufik dan Samsu, *Politik Syariat Islam*, p. 115

this institution isoccupied by people who have noexpertise but they are there because they gain many political supports. Meanwhile, experts in Islamic law, both those who are in college or in the centers of traditional Islamic studies, can only provide inputs as proposal because they don't have the authority to certify. The result is the passing of formulation of the Islamic penal code as ordinances or *qanun* without even minor consultation with Muslim scholars.

Political motivations that characterize the implementation of *hudūd* in various Muslim countries have led more to fulfill desires of the political elite than to realize the objectives of Syari`ah law for the public benefit in general. The implementation of *hudūd* is thought by Asghar Ali Engineer as having dumped the philosophical values of Islam; it tends to work mechanically without adequate understanding and necessary awareness of its correct philosophical and spiritual perspective.[183] Furthermore, Engineer argues that the Islamic penal code should not be separated from the mission of morality led by the Prophet to build a society based on distribution of justice (Q.S. Al-Baqarah, 2: 195), equality of human and fear of Allah (*atqa*), worship only to God (Qur'anic verse al-Hujurat, 49:13), equality of men and women in particular (al-Baqarah, 2: 228, al-Ahzab/33: 35), and justice in general (al-Maidah 5: 8). Islamic criminal law is not only based on these principles, but those principles have become patterns of known human daily values.

Abandonment of vision in Islamic criminal law has further showed impulsive attitudes by those in charge of its implementation. Although the *hudūd* is governed directly by al-Qur'an and Hadith, the assessment of whether someone has committed a crime punishable by *hudūd* or not is entirely decided by people, in this case the authorities. Therefore, the authorities and their colleagues could escape the *hudūd* despite the crimes they did. Instead, political opponents, the poor, women, and those who do not have access to justice are often subjected to *hudūd* without adequate verification procedures.

183 Asghar, *Islam dan Teologi Pembebasan,* p. 256.

On the one hand, the formalization of Islamic Law becomes a very effective tool to gain political support from the wider community, but on the other hand the formalization of Islamic Law in the field of criminal law can be used to silence political opponents and take repressive measures on the people in the name of Islam. Shifts in the meaning of some key words in Islamic law are quite serious in some cases. For example, the shift of meaning in the term of Islamic Syari`ah which is reduced to criminal law, and sometimes narrowed again on *hudūd*, and *hudūd* implementation itself is done without taking into account the values of monotheism and humanity as prophetic missions of Islam. Political motives dominate modern implementation of *hudūd* in order to make *hudūd* part of applied doctrines (*al-Ahkam al-amaliyah*), ignoring the foundation of *hudū d*, namely the doctrine of *Tawhid* (*al-ahkam al-i'tiqadiyah*) and moral teachings (*al-ahkam al-khuluqiyah*).[184]

When *hudūd* becomes a tool to silence people, it has lost the spirit of *tawhid* (monotheism), because monotheism or submission to Allah requires absolute obedience not to other than God, including the authorities. In the history of the prophets, monotheism becomes powerful ammunition in the fight against tyranny, injustice, oppression, slavery, despotic authorities, economic inequality, discrimination against women, and other inhumane attitudes. If the implementation of *hudūd* is led to impulsion and inhumanity it would be deemed contrary to the spirit of monotheism. Similarly, the implementation of *hudūd* which provides justification to the authorities to do capricious actions on their people contradicts Islam, because it humiliates human values. A shift in motive to implement *hudūd* can bring a shift in the main agenda of Syari`ah law, and particularly in the implementation of *hudūd*.

B. The Main Agenda

The application of Islamic criminal law, including *hudūd*, should not be separated from the general mission of Islam, that is, to realize the just and

184 Abdul Wahhab Khallaf, *Ilmu Ushul al-Fiqh,*pp. 32-33.

prosperous order of life. Strong political motivation accompanied by weak philosophical foundation tends to make the orientation of the application of Islamic criminal law become a punishing, torturing, and avenging machine with no fair procedures. The purpose of *qishās* is no longer to maintain life, but to kill a killer so that the orientation of the ruler is not to create a system of life safe for all members of society in which people are not afraid to *qishās* if they kill someone and they are also not worried to be killed because of having different opinion from their authorities, not to be forced to kill the perpetrator because of being victim of continoues domestic violence , not to be forced to kill for being raped, or for being treated unfairly.

The verdict of *qishās* in Saudi Arabia inflicts many Indonesian workers, including women. A case which disturbs a sense of justice happenned to Tuti Tursilawati, a female migrant worker who killed her boss due to repeated sexual harassment.

> One of the Indonesian workers who is subject to beheading in Saudi Arabia is Tuti Tursilawati. A TKW (Tenaga Kerja Wanita; woman worker) from Majalengka, West Java, was now in prison in the city of Ta'if, Saudi Arabia. She was jailed for killing her employer on May 11, 2010. The action came not without reason. The man was killed with a wooden flail for repeatedly raping her. After hitting her employer, Tuti fled with the wages of 31,500 Arabian Riyal and a wristwatch. On the way fleeing, she met a man who promised to help her. However, she was even locked up in a room. Here, Tuti was raped by nine men.[185]

Qishās-hudūd punishment for Muslims who change their religion from Islam in a repressive and authoritarian rule may in practice spark from differences in religious views one citizen has with the authorities. This citizen is susceptible to be accused as someone dangerous with subversive power.

185 *Derita Tuti TKI yang Divonis Qishās*, http://sumeksminggu.com/index.php?option=com_content&view=article&id=618:derita-tuti-tki-yang-divonis-Qishās &catid=921:hot-news, accesed 28 December 2014.

Rulers can use *qishās* and *riddah* or even *bughat* (subversion) to silence their political opponents in the name of religion.[186]

In an ideal world, the application of the punishment of hand amputation for thieves can be exempted from the obligation of the authorities if only they can realize the order of a prosperous life in which people are peaceful not because they are afraid their hand being cut off for stealing or robbing, but because they can meet all the needs of life easily and the employment is abundant, distributive justice either through a tax or *zakat* is going well, financial institutions of the state are not only good at collecting funds but also smart in distributing them with the correct methods and the right target, the kinship between the rich and the poor is nurtured properly so that rich people have a high concern on donation, charity, scholarship, and others, so that no one is forced to steal in order to meet their basic needs of life.

Similarly, criminal law for adultery can also be exempted from the obligation of the authorities when the system of peaceful, loving and caring marriage and family life is realized. One would not commit adultery not because of fear of being whipped or even stoned, but mainly because there is a way to satisfy their sexual needs with dignity. There are systems that prevent a person from being victims of human trafficking, and prevent any person from making money on others by prostituting. People can marry at the proper age, when they are mentally ready to take the role as husband and wife and as parents, they choose a husband or wife on their willingness, and they get access to a good income because employment is widespread. There is a mating system that can protect the rights of both husband-wife and also the parents with their children. There is a good system of documenting so that the status of marriage or divorce can be verified easily.

The case of Shahida and Sarwar in Pakistan exemplifies the poor administration system that led married couples sentenced to stoning:

186 Qishās that befell on Mahmud Muhammad Taha in Sudan can be the case that reflects this. He is the founder and leader of the Republican Brothers. At first he fought against the British and became a staunch supporter to Numeiry. But when Numeiry implemented a reckless Islamisation, he became his main critic, and Numeiry captured, prosecuted, and decapitated Taha. See Taufik and Samsu, Political Syari`ah, p. 117.

> Shahida is a young girl who was divorced according to Islamic law, but the husband who divorced her did not submit the letter of divorce to the court as required by law in Pakistan. Shahida, not knowing if the letter has not been handed over to the court, married another man, namely Sarwar. But her ex-husband, since no woman offers him a marriage, wants Shahida back. When he finds out that his ex-wife has been married to Sarwar, he reports her to the court which eventually arrests Shahida. Since the letter of divorce is not in the court, and Shahida is living under the same roof with another man, she is considered of committing adultery. Shahida and Sarwar are being stoned.[187]

The cases mentioned above show that, in practice, a crime to be convicted with *qishās* or *hudūd*, is completely in the hands of the authorities to determine. According to Ziauddin Sardar, a ban on criticizing the law of God because control or justice belongs to God alone is a simplistic argument which leads into neat totalitarian formulation. When an authority plays a role as spiritual leader and at the same time a political leader, a legislator as well as an executor, then he is really an absolute ruler.[188] Syari`ah law with political motivation is often followed by the political main agenda. *Maslahat* of the people as the primary mission of Islam is not present in the application of *qishās and hudūd* in various Muslim countries, especially ones that still struggles with problems of poverty.

Application of Islamic Law in various contexts show that the main agenda or priorities of Islamic Syari`ah through *hudūd* is not for the benefit of the people in general nor in particular for the benefit of vulnerable groups, but no other than to give judgment. Agenda to implementation of *hudūd* this way is contrary to the purpose of the Syari`ah (*Maqashidasy-Syari`ah*), which is the public good (*al-Mashalih al-ammah*).[189] Al-Ghazali mentions five terms as the goals of Islamic Law, namely the maintenance of religion, life, reason, lineage and property.[190]

187 Asghar, *Islam dan Teologi Pembebasan,* p. 257.

188 Ziauddin Sardar, *Ngaji Qur'an di Zaman Edan* (Jakarta: Serambi, 2014), pp. 417-418.

189 Jaasir, *Fiqh al-Maqashid, p.* 57.

190 Al-Ghazali, *Al-Mustashfa,* vol. 1, pp. 286-287.

Application of stoning on Shahida and Sarwar mentioned above contains total violations to those five types of maintenance: violation to the maintenance of religion because they both have carried out the procedure of marriage according to religious teachings, yet they are being accused of committing adultery, to maintenance of life for being stoned to death, to maintenance of reason because the court ignores the arguments and defense, to the maintenance of lineage for the sentence has eliminated their right to legally reproduce through marriage, and to maintenance of property because legal procedures and executions by stoning have cost a fortune in vain. Of course, instead of putting weak society in priority for realizing the benefit of the people, this kind of application of *hudūd* drags them into the position that is very difficult and vulnerable to injustice.

C. The Position of the Powerless Society

The implementation of *hudūd* by the rulers with political motives that ignore the philosophical foundations of Islamic criminal law, the more so by the despotic rulers in general, have no adequate legal system. A person can be sentenced in *hudūd* without procedures and adequate legal representation. In addition, *hudūd* has also generally been applied only to the poor and women, never been imposed whatsoever on the rich, the ruling, or the despots. This is the factors that trigger Tariq Ramadan to call for an international moratorium on *qishās*.

It is as if one does not know, as though a minor violation is being done to the Islamic teachings. A still more grave injustice is that these penalties are applied almost exclusively to women and the poor, the doubly victimized, never to the wealthy, the powerful, or the oppressors. Furthermore, hundreds of prisoners have no access to anything that could even remotely be called defense counsel. Death sentences are decided and carried out against women, men and even minors (political prisoners, traffickers, delinquents, etc.) without ever given a chance to obtain legal counsel. In resigning ourselves

to having a superficial relationship to the scriptural sources, we betray the message of justice of Islam.[191]

Concern of Tariq Ramadan that *qishās* is only applied to the weak society and not to the more powerful communities is quite reasonable because *qishās*, as *hudūd,* though being derived from al-Qur'an and Sunnah, its application is fully in the hands of the human, the elites of the country, the ruler, or powerful capital owners and the wealthy, as well as other influential circles. This group of people has enough influence to pressure the order so that they become an exception in the application of *qishās* and *hudūd*, or even in the entire law. Rule like this usually becomes a sort of unwritten norm.

The State of Brunei Darussalam, that has just passed *Perintah Kanun Hukuman Jenayah Syari`ah* in 2013 and applies it starting in 2014, affirms the State Constitution that declares the immunity of *Sultan* (King) and *Yang Di-Pertuan* namely Yang Di-Pertuan (the ruler) under *Pemasyhuran Mengangkat Raja dan Melantik Pemangku Raja*, 1959; (S 65/04) stated as follows:

> Immunity*[S 65/04]*
> 84B (1) His Majesty the Sultan and Yang Di-Pertuan can do no wrong in either his personal or any official capacity. His Majesty the Sultan and Yang Di-Pertuan shall not be liable to any proceedings whatsoever in any court in respect of anything done or omitted to have been done by him during or after his reign in either his personal or any official capacity.
>
> [S 49/04]
> (b) His Majesty the Sultan and Yang Di-Pertuan can do no wrong in either his personal or any official capacity:Provided that provision may be made by laws enacted under the Constitution for the bringing of proceedings against the Government or any officer, servant or agent thereof, but not His Majesty

191 Tariq Ramadan, *An International call for Moratorium on corporal punishment, stoning and the death penalty in the Islamic World*, accessed through website of Tariq Ramadan: http://tariqramadan.com/blog/2005/04/05/an-international-call-for-moratorium-on-corporal-punishment-stoning-and-the-death-penalty-in-the-islamic-world/ on 29 Desember 2014.

the Sultan and Yang Di-Pertuan, in respect of wrongs committed in the course of carrying on the government of Brunei Darussalam.

Two rules in the Constitution of the State of Brunei above are understood in different ways. One understanding mentions that this constitution means that *hudūd* in Perintah Kanun Hukuman Jenayah Syariah, 2013 and all other laws do not apply to the Sultan and Yang Di-Pertuan, either in personal or in any official capacity.[192] Others say that the understanding of the term *Sultan Can Do No Wrong* should be likened to the term *King can do no wrong* in the parliamentary system of governance as applied in the UK. In this system there is a parliament, a cabinet led by the prime minister, and king or queen or a president as head of state. The chief executive is held by the prime minister who heads the cabinet, while the head of the state is only a unifying symbol. In this system the head of state is not responsible for any policy taken by the cabinet. Therefore, errors made by the cabinet cannot involve the head of state. This is the meaning of the term *King can do no wrong*. If it refers to the term, hence the term *Sultan can do no wrong* simply means that the Sultan could not be involved in the mistakes made by the cabinet in Brunei.

However, application of the law always involves power relations. Law tradition which gives a privileged position to the ruler, including the law of *jinayah* with *hudūd,* which only applies for the people and the weak. *Hudūd* as the maximum punishment which is supposed to be a tool to eliminate crimes of snapper class or crimes often committed by a country officials are only used to crush petty crimes committed by ordinary people with the limited financial and legal defense.

Rules, written or unwritten, that protect the rulers of the land from *hudūd,* indicates that the mechanism of repentance and forgiveness has been imposed on them before they do the crime, while the same repentance

192 Ahmad Farouk Musa in a show by YouTube embraces this understanding and considers that the constitution is the one that makes Sultan eager to implement Islamic Criminal Law, because this law will not be imposed on the Sultan and his family. Farouk also likens the term *Sultan Can Do No Wrong* with the concept of *Ma'shum* (infallible) in Islamic theology. Quoted on July 5, 2015 from https://www.youtube.com/watch?v=VwbaJlFsvsA.

and forgiveness mentioned in every verse on *hudūd* is not given and not used as an opportunity by maximum to transform physical punishment to non-physical punishment without ignoring the rights of victims, especially for crimes committed by people in all their limitations. The authorities of the country whose abundant treasure, higher education, and brilliant career, given access to legal representation, are forgiven easily, even immune to *hudūd*. Meanwhile, people with all the hardships such as poverty, low education, employment uncertainty, burden with the lives of many, are given the maximum penalty in *jinayat;* this condition, of course, is contrary to the spirit of Islamic criminal law.

The implementation of *hudūd*, according to Asghar Ali Engineer, should consider two categories of crimes, crimes caused by an urgent need, and crime due to the naughty in character. The first type of crime, often committed by poor people, should not be punished or only being lightly punished,such as stealing because of starvation. As for the second type of crime, driven by evil nature, the perpetrators must be severely punished such asrobbing, selling drugs, illicit trafficking, loan-sharking, put-in- stack most needed commodities, deceiving and so forth. This type of crime is not only annoying personal interests, but also the interests of society as a whole. It is not ordinary crime, but a crime which has hazardous damage (*fasad*) .[193]These include human traffickers (not their victim), corruptor, illegal loggers, terrorists, and other perpetrator of high profile crimes. It is them that should get the maximum penalty for criminal law in Islam.

For the petty criminals, the first-timers, because of ignorance or no sufficient information, the impact is not so massive, and then repentance and forgiveness guaranteed in al-Qur'an can be taken by the authorities to serve as the basis for lighter punishment without ignoring the rights of victims. In contrast to felons, the old-timers, the ruling should be careful not to fall pity on them given the damage which is massive. Not the other way around, to the hard-edged criminals the rules dare not to be decisive because of threats or enticements in the form of lucrative bribes, while to the petty criminals,

193 Engineer, *Islam dan Teologi Pembebasan,* p. 260.

they are extraordinarily adamant. The application of *jinayat* in Islamic law that discriminates against the weak society like this will only make a weak group in a Muslim society, especially the poor, women, even more poor women, be casualties of oppression in the name of religion.

The above description indicates a problem related to the concept of *hudūd* itself, i.e., whether *hudūd* is God's provision that cannot be contested, or rather restriction as ordained to open space for interpretation as long as it is still working within the limits of the corridor. Besides, problems also arise concerning whether *hudūd* should be understood literally, limited to what is mentioned in the texts of al-Qur'an and Hadith, or understood contextually so that it can include moresophisticated crime in modern time. The implementation of the literal *hudūd* which are going on in the modern state has the problems related to the dialectic between text and reality. Social changes that occur continuously can incur other forms of crime that once considered of high profile it is now petty because of the emergence of the new type of crime such as theft by corruption. The scholars have actually provided the scientific tools to address this through the concept of *ijtihad,* either *Ijtihad Bayani (al-ijtihad min an-nushus), Ijtihad Qiyasi,* and as well as *Ijtihad Istishlahi*.

The impact of the literal understanding of *hudūd*, other than limited types of *hudūd*, is the vulnerable position of women to experience the "revictimization" because of gender inequality.

D. "Re-victimization" of Women

Unequal gender relations in the society often put women in an unpleasant position. Biological differences between men and women have been used to marginalize, belittle, give negative labelling, provide double burdens, or commit violence against women. Unfortunately, forms of gender inequality are most often supported by rulers. For example, the Governor of Jakarta, Fauzi Bowo, on September 16, 2011, stated regarding the cases of rape that occurred in the city transport:

> Just imagine when people ride the minibus, some sit before a woman wearing a mini skirt, it makes them rather stifling. When a woman rides motorcycle wearing tight shorts, just imagine, others behind her would ride agitated.[194]

His statement accrues public protests that eventually forces the governor to apologize and says that he never intends to harass women. The same thing happened to a prospective candidate to attorney general (DS). When asked by a member of House of Representatives on the granting of the maximum punishment for the perpetrators of rape in a fit and proper test session of nominees in the House of Representatives Commission III on Monday, January 14, 2013, he replied that the maximum sentence is not necessary because both victim and rapist equally enjoy the deed. Ironically this statement is responded positively by members of the commission participating the session, adding the information that 50 % of women in Jakarta are not virgin anymore. This statement has also drawn strong criticism that DS doesn't qualify the nominee. He then apologized and said sorry.[195]

Such statements also appeared in the name of religion. In 2011, the regent of Aceh Barat (RM) said that in Aceh Barat women who did not dress according to Islamic Syari`ah deserved to be raped. This statement was criticized as rough, uneducated, and threatening people, especially women. This statement contained dangerous logic because it could be used as a legitimation for thugs to rape women who did not wear dress unsuitable with Syari`ah, it could even inspire police men to abuse this for their interests.[196] Chairman of the Indonesian Islamic Scholars Council (Majelis Ulama Indonesia[MUI]) also criticized the regent's thinking and said that

194 *"*Foke: Di Angkot Pake Rok Mini, Bikin Gerah*",* http://metro.news.viva.co.id/news/read/247635-pemprov-harus-evaluasi-kepemilikan-angkot, accessed 29 December 2014.

195 „Calon Hakim Agung Daming Sunusi Minta Maaf atas Pernyataannya", from http://www.voaindonesia.com/content/calon-hakim-agung-daming-sunusi-minta-maaf-atas-pernyataannya/1584544.html, accessed 29 December 2014.

196 *"Di Aceh Barat Perempuan tak Berpakaian Sesuai Syariah Layak Diperkosa?"* News accessed on Desember 29, 2014 from http://www.memobee.com/index.php?do=c.every_body_is_ journalist&idej=709.

a woman wore a tight dress might trigger certain negative thinking among young men, but that did not mean that she requested to be raped.[197]

The view of a public official avove was unsympathetic to female victims of rape and indicated the ruler's perspective of imposing public morality only to women, not to men, or men and women altogether. The way a woman dresses or the morality of a woman is seen as a cause of rape. On the other hand, the failure of a man to refrain from rape and man's morality are not seen as the causes of rape. Moreover, in Muslim communities in general there is still a strong point of view that public space belong to men, while a woman's place is at home; so that in cases of sexual harassment, including rape in a public space, it is considered as the fault of woman.

The ways of looking at unequal gender relations have a major influence on the implementation of *hudūd*, especially regarding sexual relations. Sexual intercourse of men and women provides completely different impacts on both; a woman can experience pregnancy, miscarriage, childbirth, postpartum, and breastfeeding, in which men are excluded to do so. In other words, sexual intercourse in women leaves a long trail of physical evidence, whereas in men it doesn't. Meanwhile, sexual intercourse is not solely related to physical contact but also to the willingness of the perpetrators, so that there is sexual intercourse desired by both sides, but there is also sexual relationship desired only by one party, while the other suffers coercion or become rape victim. Rape is not related to biological differences, but to the inequality of relationship where the position of the rapists is stronger than the victims, generally women. Neglecting this unequl gender relations can lead female victims of violence being punished.

A woman's biological condition causes her to be in a more vulnerable position to be punished for adultery than men. Men and women who have sex outside marriage have been affected by the law in the eyes of people

197 "Outrage, Ridicule Leveled at West Aceh Politician After Rape Comment", news accessed on Desember 29, 2014 from http://thejakartaglobe.beritasatu.com/archive/outrage-ridicule-leveled-at-west-aceh-politician-after-rape-comment/391768/

who apply *had* of adultery, not yet in God's perspectives. Men don't have hymens that tear when sexual intercourse is committed, while women have them, so they are potential to be asked as evidence. In the debate about the virginity tests for Indonesian students, this hymen to be the evidence during the court session is being discussed vehemently. Female students are asked to be tested their virginity to determine whether they have ever had sex outside marriage or not. Male students are not likely to be tested their virginity; it is not required for them, since man is always thought as never having sex outside marriage. This test has been planned by the Department of Education of Prabumulih in South Sumatra for female students as a requirement to continue education in high school in the academic year 2014 to determine whether they have sex or not. MUI of Pamekasan in East Java even encourages governments to make laws relating to virginity tests for prospective students to attend school.[198]

This discourse amasses protests from various parties, including the Ministry of Education and Culture which questions the purpose of virginity tests and assesses the proposal as not wise in the education system. Education Minister even threatened to impose sanctions on schools that perform virginity tests because they are deemed harmful to others and diminishing the rights of citizens to education. Kunthi Tridewayanti from Komnas Perempuan considers these rules as representing a stigma that moral decadence in children and adolescents is perpetrated by women, while men are always considered innocent.[199] The purity of a girl not only symbolize her own purity but also the purity of the family and the society, so that the punishment doesn't just come from her family that might isolate her, but also from her society and the state. If the virginity tests are run in a society or a country applying *had zina*, the loss of women's hymen could be reason for the application of the flogging on them, while men cannot be tested for virginity so that they may escape from flogging though they commit

198 "MUI: Tes Keperawanan Perlu Masuk Undang-undang", accessed on Desember 29, 2014 from http://regional.kompas.com/read/2013/08/20/1259325/MUI.Tes.Keperawanan. Perlu.Masuk.Undang-undang.

199 *Keperawanan Dipersoalkan, Bagaimana Keperjakaan?* accesed on Desember 29, 2014 from http://nasional.kompas.com/read/2013/08/22/1701340/Keperawanan. Dipersoalkan. Bagaimana.Keperjakaan.

adultery many times.

Subsequent differences in impacts for men and women who have sexual intercourse are that women would experience their pregnancy which is getting bigger and bigger, while men wouldn't have it. Men could easily deny the fact that they have had adultery, especially when they learn that their confession may lead them being flogged 100 times, or even being stoned to death. In contrast, woman's pregnancy may serve as proof that she has committed adultery so that she can be flogged 100 times or stoned to death. Men also benefit from the difficulty of proving adultery with a requirement of four witnesses who see the penetration process.

Thus, men who have sex outside marriage could easily free from flogging and stoning through denial, and also the difficulty of presenting witnesses, while women are not able to deny the fact that the tearing of the hymen and their pregnancy both have the potential to be used as evidence that they have committed adultery. Men can swing freely while women must experience nine-month pregnancy, giving birth, and breastfeeding while waiting to be whipped or stoned.

Differences in impact between men and women who have sex outside marriage may become longer if it is committed by force or rape. Rape, as adultery, is quite difficult to prove because it relies on the recognition (*iqrar*) of the rapist which is almost impossible when the perpetrator is aware of the consequences of being whipped or even stoned to death. The testimony of four people who witness the penetration process is equally hard; *visum et repertum* made by physicians in general only to describe the objective conditions of the vagina but not to assert the rape, especially if there is a threat of punishment of *qadzaf*; while DNA tests were not yet recognized by all *Qanun Jinayah* as a means of substantiation.

Women victims of rape have another problem if the procedure of proof is equated with adultery and *qadzaf*. Proof on rape case should be on the rapist, not the victim. In addition, difficulties can also arise because of the value of the testimony: women's testimony is not recognized or acknowledged only half than that of men while it requires that they can present four witnesses who see the penetration process when the rape took place. In addition, rape victims must suffer psychological shocks that require tranquility so that the

legal process can generate trauma of rape which have not been recovered, especially if rape committed by a group of men (gang rape). The female victim of rape face even greater difficulty if she is a child or disabled, or if the perpetrator is her own husband.

Women victims of rape are often treated as having committed adultery because of the difficult procedures of proving rape. Some Muslim countries even do not recognize the term rape in *jinayat* law which they apply. Women victims of rape are in the end entangled with the punishment for adulterers, whipped 100 times and stoned to death. Here are some cases that occur in various countries:[200]

> In an area under control by the Taliban, there are cases of rape which the female rape victims who demand justice was charged with having sex and thus killed because of their less convincing evidence of rape. On August 9, 2010, the Taliban court found a woman guilty of pregnant as a result of "illicit relations". After being imprisoned for three days in a remote area in the province of Badghis, she was whipped 200 times and then shot in the head three times.

> In 2001 in the state of Sokoto Nigeria, Safiya Hussaini Tungar Tudu was sentenced to death by stoning because of having a child outside marriage. She testified as having been repeatedly raped by a married neighbor, but she remained accused of adultery. After a long legal assistance, a year later the case was stopped.

> In October 2008, Aisha Ibrahim Duhulow, 13 years old, was sentenced to death in Kismayu, Somalia, for being accused of committing adultery. She was executed by 50 people in the stadium and watched by about 1,000 spectators. Amnesty International reported that Aisha had been raped by three men, but was accused of committing adultery when she tried to report the rape to the al-Shabab militia who controls the city's port. None of the perpetrators were arrested or punished.

200 "Mapping Stoning in Muslim Context", dikutip pada tanggal 23 Desember 2014 dari http://www.wluml.org/resource/mapping-stoning-muslim-contexts.

In addition to *had zina*, *had qadzaf* has often entrapped women as the victims of rape

Who seek for justice. This is because some views of *fiqh* do not distinguish rape from adultery, or the verification procedures to prove rape are equated with adultery which lead to a situation that female victims of rape have difficulty to prove the case. The result is the confession that a woman make that she has been raped may even cause her to be charged as making false accusation of adultery to the perpetrator. The woman who is raped and becomes pregnant, her pregnancy can even be used as evidence that she has committed adultery so she is subjected to *had zina* in the form of 100 lashes or even stoning. If a woman is raped, gets pregnant then reports to the court that she is raped, but she cannot substantiate the allegation, especially if local *jinayat* law doesnot recognize rape, then she could be sentenced according to law of *qadzaf* by being flogged 80 times.

In some *fiqh* books, scholars have distinguished between adultery and rape, where *zina* is punished with *had*, while rape is not. However, there are no views on *fiqh* that differentiate the way of proving of either rape or adultery. The impact is as mentioned above, women experience revictimization, victimized by dubious kind of law treatment. Evidence of rape and adultery should be distinguished, because rape is a crime above crime, meaning a crime that has double layers, and then the proof should use the proof of crimes, not proof of adultery. Specifically, crimes against honor should be disclosed, while case of adultery should be closed and veiled with repentance to God.

Other case that also put women in a vulnerable position is when abortion is considered as an act of murder. Brunei's *Jinayat* law prohibits all kinds of abortion of either already in the form of fetus or not yet a fetus. These actions categorised as part of the act of murder, except for medical reasons where pregnancy forwarded the risk of loss of life for the mother is greater than an act of abortion.[201] Women victims of rape who become pregnant and then take abortion to reduce the burden of rape will be subject to criminal penalties in Brunei if she is physically healthy.

201 See Clause 158-164 Section *Qatl dengan Pengguguran Janin* (Murder by abortion of Fetus), *Perintah Kanun Hukuman Jenayah Syariah* (decision by Qanun Jenayat of Syari`ah Law), 2013 Brunei.

Political motivation, political agenda, the weak position of society, and the re-victimization of women that often arise in the implementation of *hudūd* indicate that the mission and the impact of the implementation of *hudūd* in Muslim countries today have shifted far enough. Benefit and common prosperity which can only be achieved by facilitating the general public in order to meet their needs with ease is not reflected in the implementation of *hudūd*. This happens because *hudūd* is separated from a large building of Islamic theology and freed from the philosophy of Islamic law. Political contestation has put *hudūd*, a tiny portion in the great building of theology and philosophy of Islamic law, to become the main identity of Islamic law.

The Syari`ah law which brought the re-victimization of women is contrary to the mission of Islam as a mercy for all creatures including women through its teachings. Besides, it also contradicts the embodiment of justice as the ultimate goal of Syari`ah law through a breach of all the maintenance of religion, life, intellect, lineage, and soul.

Problems that emerge in the application of Islamic Law in general, and specifically *hudūd*, in modern countries can be categorized as problems related to reality, and problems related to the religious consciousness. Problems related to reality comprise of social changes that necessitate a shift in relations between the countries, relations between the state and corporations, relationship between the rulers and the people, relation between religion and state, relation between genders, relation between religious leaders, technological development which is very closely linked to the development of crime, and other sort of problems . The problems associated with the religious consciousness may lie in the Muslims who practise it and not on the teachings of Islam itself. However, if the same problem becomes increasingly common in the implementation of *hudūd*, it is necessary to consider that the problem might not be in the teaching of Islam itself, but on the way we respond to this teaching. The knowleageable scholars have formulated Islamic teachings into the system based on knowledge, experience, and the challenges of their respected era. The problem, of course, is not on this formulation, but on the way we respond to it by ignoring the dynamic challenges of times in the past, present, and future. Therefore, efforts to reinterpret *hudūd* as formulated by Muslim scholars throughout history need to be supported.

Chapter Six

The Efforts To Reinterpret Hudūd

The efforts to reinterpret Islamic concepts, paradigms, methods or specific topics are not something new. Reinterpretation is important when the old concept which was able to respond to the previous condition can no longer respond to new challenges in different era due to the changes of values, impacts and other aspects. The spirit of the old concept can still be maintained to respond to the specific needs of the new contexts. Though there are debates and various opinions about *hudūd* since the classical era, it is still important to discuss the efforts of Muslim scholars in the modern era and the support of the relevant classical scholars in responding to the problem of the implementation of *hudūd* in modern states. This chapter will discuss Muslim scholars' opinion on *Syari`ah, hudūd*, *rajm*, the value of female witness, abortion for the rape victims and flogging.

A. Syari`ah as a Comprehensive Teaching

The term "Syari`ah" has an important role within Muslim religious consciousness. It is sometimes known as *syar'i* (in accordance with Syari`ah). It is also often being equalised with Islam such as the term of Syari`ah bank, Syari`ah insurance and *syar'i* clothes which are regarded to be different from secular bank, insurance and clothes. However, sometimes this term is understood as law or Islamic law.[202] For example, the Faculty of Syari`ah means the Faculty of Islamic Law and the term "implementation of Syari`ah"

202 According to Abdullahi Ahmed An-Na'im, the term Syari`ah can include historical Islamic law, and also the concept of alternative public law derived from Islam or "modernSyari`ah". He also affirms that the term Syari`ah used in his book means classical Islamic law.Ahmed an-Na'im, *Toward,* p. 1-2.

is understood in a more narrow meaning as Islamic criminal law or the application of *hudūd, qishas* and *ta'zir* despite there is another criminal law mechanism in the same place and country.

The meaning of Syari`ah, from the broad into the narrow meaning, is changing in the Muslim consciousness so that Islam is often being regarded as identical with the implementation of the Islamic criminal law, especially *hudūd*. A society or a state is not regarded as Islamic before it implements *hudūd*. Gradually, *hudūd* is becoming the main identity of Islam for societies or states and is becoming the main agenda of the implementation of Islam in many places. The main agenda of Syari`ah is actually to create public welfare, which is believed to be achievable by itself if the Islamic criminal law is implemented. However, heavy political motives and discriminatory treatment in the implementation of Islamic criminal law in various places which tend to be implemented only for the poor and the women have made the public welfare which becomes the aim of Syari`ah is narrowing into becoming the welfare of the ruler, either the ruler of politics, economy, culture or religion.

This condition has raised Muslim scholars' concern with this issue as Ziauddin Sardar expressed:

> Throughout the history of Islam, Syari`ah has never been squandered, misunderstood and wrongly described in such way which is worse than it is today. Syari`ah has been used to justify oppression, despotism, injustice and debauchery. It is understood as frozen law frame, which is regarded as little or nothing to do with the modern era. It is presented as anti-intellectual knowledge from the past, not from the current or future era.[203]

The same concern was also expressed by Asghar Ali Engineer who sees the tendency of the implementation of Syari`ah law to weaken women.

> Those who do not know the origin and the development of Syari`ah often assume that Syari`ah (1) is completely divine and (2) unchangeable. This

203 Sardar, *Kembali,* p. 99.

> view is often expressed in the general conversation and being supported by conservative ulama. In fact, it is the opposite. First, Syari`ah was not being formulated at once, it was developed through tortuous evolution process for decades; second, Syari`ah has never been static, as assumed by many people.[204]

Literally, Syari`ah means wide way toward the source of water or the spring, the source of all lives. Within Muslim civilization, Syari`ah describes indefinite and unsatisfied worldly spiritual thirst: Muslim society have never stopped searching for the better form of the implementation of Syari`ah to deal with all current and future problems. The Islamic nature of Muslim civilization is measured by the success in searching for God's law or Syari`ah, that is how close the effort of the civilization with the "spring" when Muslims try to implement the principles of law, ethic and Syari`ah methodology.[205] Similarly, Quraish Shihab argues that the word *syir'ah* and *Syari`ah* originally means a lot of water or the way toward the spring. Religion is called Syari`ah because it is the source of the spiritual life just like water which becomes the source of physical life. Religion can also purify the spiritual dirt just like water purifies the physical dirt.[206]

The literal meaning of Syari`ah as the way toward the source of water, where people can drink, clean and freshen up their bodies has become blurred since the eighth century in the era of the Abbasids when Islamic law had been institutionalized. Syari`ah was socially constructed in the history, not only as law but also as morality. What is being called Islamic law is only a range of *fuqaha* (jurists) opinion which was socially constructed during the Abbasids era in about the eight and the ninth centuries after *hijra* (the time of the Prophet Muhammad's moving from Mecca to Medina). Now what is regarded as Syari`ah includes many layers of classical law which is known as *fiqh* which is regarded to be immutable. This is contradictory with the fact that none of the classical *fuqaha,* who developed the methods of the formulation of Islamic law claimed the monopoly of interpretation or

204 Engineer, *Hak-hak Perempuan dalam Islam,* p. 99.

205 Sardar,*Kembali,* p. 98.

206 Muhammad Quraish Shihab, *Tafsir al-Mishbah* (Jakarta: Lentera Hati, 2009), j. 3, p. 139

regarded that their opinion was final and the most valid opinion. It was the generation after them who made that the opinion of these classical *fuqaha* was final and canonical along the development of various schools of Islamic law.[207] Similar with this analysis, Engineer states that *ijtihad* which becomes the key to the implementation of dynamic Syari`ah has been closed soon after the collapse of the Abbasids in the 12th century. Syari`ah has begun to gain its static characteristic and being accepted as immutable.[208]

The word Syari`ah actually is only mentioned twice in the Qur'an, in the Qur'anic verse al-Jatsiyah, 45:18 and al-Maidah, 5:48.

ثُمَّ جَعَلْنَاكَ عَلَى شَرِيعَةٍ مِنَ الْأَمْرِ فَاتَّبِعْهَا وَلَا تَتَّبِعْ أَهْوَاءَ الَّذِينَ لَا يَعْلَمُونَ

Then We put you, [O Muhammad], on an ordained way concerning the matter [of religion]; so follow it and do not follow the inclinations of those who do not know.

(QS. al-Jatsiyah, 45:18)

وَأَنْزَلْنَا إِلَيْكَ الْكِتَابَ بِالْحَقِّ مُصَدِّقًا لِمَا بَيْنَ يَدَيْهِ مِنَ الْكِتَابِ وَمُهَيْمِنًا عَلَيْهِ فَاحْكُمْ بَيْنَهُمْ بِمَا أَنْزَلَ اللَّهُ وَلَا تَتَّبِعْ أَهْوَاءَهُمْ عَمَّا جَاءَكَ مِنَ الْحَقِّ لِكُلٍّ جَعَلْنَا مِنْكُمْ شِرْعَةً وَمِنْهَاجًا وَلَوْ شَاءَ اللَّهُ لَجَعَلَكُمْ أُمَّةً وَاحِدَةً وَلَكِنْ لِيَبْلُوَكُمْ فِي مَا آتَاكُمْ فَاسْتَبِقُوا الْخَيْرَاتِ إِلَى اللَّهِ مَرْجِعُكُمْ جَمِيعًا فَيُنَبِّئُكُمْ بِمَا كُنْتُمْ فِيهِ تَخْتَلِفُونَ

And We have revealed to you, [O Muhammad], the Book in truth, confirming that which preceded it of the Scripture and as a criterion over it. So judge between them by what Allah has revealed and do not follow their inclinations away from what has come to you of the truth. To each of you We prescribed a law and a method. Had Allah willed, He would have made you one nation [united in

207 Sardar,*Ngaji,* p. 494-497.

208 Engineer, *Hak-hak Perempuan*, p. 10.

religion], but [He intended] to test you in what He has given you; so race to [all that is] good. To Allah is your return all together, and He will [then] inform you concerning that over which you used to differ (al-Maidah/5:48)

According to Quraish Shihab, the Qur'an uses the word Syari`ah in a narrower meaning than the word *din* (religion). Syari`ah is the way provided for certain group (*umat*) and certain prophet such as the Noah's Syari`ah, Abraham's Syari`ah, Moses' Syari`ah, Jesus' Syari`ah and Muhammad's Syari`ah. *Din* (religion) is divine guidance which is general and for all groups. This means, *din* (religion) consists of so many Syari`ahs.[209] The Qur'an even uses the word Syari`ah in a very general meaning because it includes the Syari`ah of the prophets before Muhammad pbuh. The Syari`ah of the Prophet Muhammad is all the teachings from the Messanger Muhammad pbuh. The Qur'an as the source of Islamic teaching brought by the Messanger Muhammad pbuh does not use Syari`ah to mean only as Islamic law, Islamic criminal law or *hudūd*. In other words, the narrow meaning of the word Syari`ah as Islamic criminal law does not originate from the Qur'an. Narrowing down the meaning of Syari`ah with Islamic law is similar with narrowing down the meaning of fruit only for manggo, and narrowing down the meaning of Syari`ah with Islamic criminal law is similar with narrowing down the meaning of fruit only for certain type of manggo.

The formulation and the implementation of Islamic criminal law cannot be contradictory with Syari`ah because Islamic criminal law is part of Syari`ah. Ibnu Qayyim gives parameter whether or not something, including Islamic criminal law, is in accordance with Syari`ah. Syari`ah is based and built on reasonable consideration and to protect public interest. Syari`ah is about justice, compassion, kindness and wisdom. In principle, whatever changes justice into injustice, compassion into cruelty, kindness into badness and wisdom into ignorance cannot be claimmed as Syari`ah. Ibnu Qayyim also confirms that the main aim of Allah's teaching and books is to always give justice, therefore whatever can bring into the aim of justice can be regarded as an important part of Allah's rules.[210]

209 Shihab, *al-Misbah*, v. 3, p. 139.

210 Mohammad Hashim Kamali, *Hukuman dalam Undang-undang Islam Suatu Penelitian terhadap Hukum Hudūd Kelantan dan Terengganu* (Petaling Jaya: Ilmiah Publisher, 2003). p. 24.

The different meanings of Syari`ah as described in the Qur'an with the narrow meaning of Syari`ah as understood by the current Muslim societies has led into three discrepancies: (1) Syari`ah is often contradictory with the tight Qur'anic instruction, (2) what is regarded as marginal issues by the Qur'an, or as the boundary condition, is in fact being regarded as the main norm of Syari`ah, and (3) although the Qur'an repeatedly emphasizes justice, the implementation of Syari`ah often causes injustice. The examples of such discrepancies are as follows.

1. The Qur'an states that "there is no compulsion in religion", but Syari`ah (in narrow meaning, *fiqh*) instructs death penalty for apostasy.
2. Syari`ah instructs *rajm* (stoning to death) for *zina* (adultery) while there is no single verse in the Qur'an, explicitly or implicitly, mentioning about the punishment of *rajm*. In addition, the Qur'anic injunction about the flogging for those committed fornication requires four witnesses, which made it almost impossible to prove the act of *zina.*
3. The Qur'an asks four witnesses to prove the act of obscene to ensure that there is no injustice directed to those who are being convicted to commit *zina*, especially women. However, Syari`ah treats rape just like the act of obscene. When there is no witnesses, the victims of rape are treated as the women who are committed *zina*. Therefore, because of Syari`ah, women can become victims for twice.
4. The Qur'an does not give specific punishment for homosexuality, but the current Syari`ah determines that homosexuality is punished severely, including death punishment.
5. Almost all Syari`ah injunctions in relation to women such as divorce, divorce alimony, the custody of the children tend to subordinate women and to be anti-women, while the Qur'an requires men and women to be treated equally before the law.
6. Syari`ah makes *hudūd* become the norm. *Had* or *hudūd* which means the limit or the outer fence and aims to give the substance of moral for Muslim societies has been changed into the rigid norm. Syari`ah has made the death penalty as the specific characteristic of Islamic law. Based on Syari`ah, it seems there is only one rule: kill everybody who disagrees

with you, or you have been misguided or breaks your own rules. This is the total antitesis for the Qur'anic spirit.[211]

The nature of Islam and Syari`ah should be returned into their original meaning as a comprehensive system, not limited to Islamic criminal law. Abdullah al-Khalifah quoted by Hashim Kamali describes the meaning of comprehensive Islamic Syari`ah as follows:

> Islam provides comprehensive guidances, not only on issues of worshiping God (ibadat), but also social relation within and outside the family. It emphasizes to do kindness and to avoid abominable acts, to do kindness to parents, friends, relatives, neighbors, orphanes, the poor and travellers and to protect their wealth. Islam prohibits committing small and big sins, forbidden and abominable acts. Islam also prohibits dringking alcohol, taking usury, and being dishonest and deceiver. Almost all types of ibadat in Islam are undertaken publicly, raising mass awareness that ibadat can prevent criminal act so that pious people will regard that criminal act is breaking God's laws, which certainly being regarded to be contradictory with their belief.[212]

The above explanation shows that Islamic criminal law or *jinayah* is only part of the broad Islamic Syari`ah. The application of this punishment cannot be separated from the whole structure of Syari`ah law. The relationship among human beings (*fiqh muamalah)* is related with the relationship between humans and Allah (*fiqh ibadah)*. Every act of Muslims, including their relationship with other human beings should be accounted before Allah. Similarly, what is called *ibadat* should have good implication on the relationship among human beings. The right prayer is the prayer which could raise awareness to prevent the person from doing something bad, the accepted pilgrimage should be characterised with the change of behaviour of the person into being better to others. Similarly, the good fasting is characterised by the high social care to those who are forced "to fast" almost all the time due to their economic difficulties.

211 Sardar,*Ngaji*, p. 497-498.

212 Kamali, *Hukuman*, p. 143

The conclusion of this discussion is that the term Islamic Syari`ah include the whole teachings of Allah brought by the Messanger pbuh. Islamic law in general or specifically Islamic criminal law, *hudūd,* is only a small part of the big structure of Islamic Syari`ah and therefore does not represent the whole Islamic Syari`ah. The changing meaning of Syari`ah which tend to narrow also occurs with the term *hudūd* and therefore the effort to discuss the term *hudūd* is as important as to discuss the term Syari`ah. Otherwise the application of *hudūd* is detached from the big structure of Islamic Syari`ah, and even detached from its aim.

The application of *hudūd* cannot be detached from other teachings within Islamic Syari`ah such as *had* for stealing should be aligned with the teaching on *zakat* (compulsory alms) and *sedekah* (voluntary alms) as distributive efforts which guarantee the citizen especially the poor to fulfill their primary needs so they do not need to steal. Similarly, the *zina had* [the punishment for adultery] should be aligned with Islamic teaching which allow citizens to fulfill their sexual needs legally and comfortably as well as with the concept of happy family based on love and compassion.

Other than the term Islamic Syari`ah whose meaning is changing, the term *hudūd* itself experiences similar changes in its meaning which can cause its own complication in its formulation and application.

B. Hudūd as Limit

Islamic criminal law *(jinayah)* formulated by the expert of Islamic law has three categories of punishment for criminal acts. *First*, *had* or *hudūd,* is the limit of punishment stipulated by the Qur'an and Sunnah. *Had* consists of seven criminal acts: *zina muhshan* by being punished with *rajm*, *zina ghairu muhshan* by being punished with flogging 100 times, *qadzaf* or accusing someone to have comitted adultery/fornication by being punished with flogging 80 times, *murtad* [apostate] by being punished with death penalty, drinking *khamer* [liquor] by being punished with flogging 80 times, stealing by being punished with hand cutting, and robbery by being punished with hand cutting tangan in crisscross manner until death penalty. *Second, qishas* is the punishment for murder, which is the debt of life is paid by life

which can be abrogated by forgiveness from the victim's heir or by paying compensation or punishment for violence which wounds the body. *Third, ta'zir* is the punishment decided by the judges and it depends on what type of violation being committed. The punishment should not be the same with the punishment of *had* and *qishas*.[213]

Even though *hudūd* is defined as the limit of punishment stipulated by the Qur'an and Sunnah as described above, according to Hashim Kamali, the discussion of *hudūd* among the fuqaha shows that the four categories of crimes agreed as *hudūd* are expanded into six and even seven categories. In addition, even though the Qur'an provides room for repentance and self-changes into better behaviour in relation to the four crimes of *hudūd*, unfortunately, this room is often ignored and subordinated by the law experts only as a formal process which does not show the original teaching spirit of the Qur'an.[214] In other words, the different opinion among the *fuqoha*, both classical and modern scholars, can also be found in the discussion of *hudūd,* including Islamic criminal laws in Muslim countries which currently implement *hudūd*.

The word *had* literally means limit, limitation, or factor that limits something. Punishment is being called *had* because it limits the criminal acts.[215]*Had* literally also means the limit which prevent and preclude something from passing another thing. In Arabic language, the door guard *(bawwab)* and the jail guard *(sijjan)* is also called *hadad* because they prevent people in general to enter the area they guard.[216] The Qur'an mentions the basic word of *had* as "*ha-da-da"* and its derivation many times:

1. *Haadda* (Qur'anic verse al-Mujadilah, 58: 22): مَنْ حَادَّ اللَّهَ وَرَسُولَهُ (the people who are against Allah and the Messenger): Islamic teaching in general.

213 Muhammad Iqbal Siddiqi, *Hukum Pidana dalam Islam*, translator Abdullah Ghalib (Depok: Maktabah an Nahla, t.th.), p. 73-74

214 Kamali, *Hukuman,* p. 31

215 Engineer,*Islam dan Teologi Pembebasan*, p. 255.

216 Kamali, *Hukuman, p. 73.*

2. *Yuhadidi* (Qur'anic verse at-Taubah, 9: 63): مَنْيُحَادِدِاللَّهَوَرَسُولَهُ (whoever is against Allah and the Messenger): Islamic teaching in general.
3. *yuhaadduuna* (Qur'anic verse al-Mujadilah, 58:5,20): يُحَادُّونَاللَّهَوَرَسُولَهُ (the people who are against Allah and the Messenger): Islamic teaching in general.
4. *Hudūd* (Qur'anic verse al-Baqarah/2:187): the prohibition to have sexual relationship during the period of staying in the mosque (*i`tikaf*), Qur'anic verse al-Baqarah, 2: 229: Allah's laws on *thalak* (divorce initiated by men) and *khulu'* (divorce initiated by women), (Qur'anic verse al-Baqarah, 2:230): Allah's laws on *thalak* three times, (Qur'anic verse an-Nisa, 4: 13,14): Allah's laws on inheritance, (Qur'anic verse at-Taubah, 9:97): Allah's and the Messenger's laws in general, (Qur'anic verse at-Taubah, 9:112): Allah's laws in general, (Qur'anic verse al-Mujadilah, 58:4): Allah's laws on *kafarat dhihar (*punishment for regarding wife as mother), (Qur'anic verse ath-Thalaq, 65:1): Allah's laws on *thalak*.

The above facts show several interesting points. *First*, the Qur'an uses the word *had* and its derivation to refer to the meaning of Allah's law in general, the laws of Allah and the Messenger, family law which consists of sexual relationship between husband and wife, *thalak, khulu',* inheritance and *dhihar*. *Second*, the Qur'an also uses the term *hudūd* for the personal law such as *dhihar,* inheritance*, thalak*, and *khulu'*. *Third, hudūd* in the Qur'an is not limited to certain Islamic criminal law as developed in the term Islamic law.[217] *Fourth,* the Qur'an does not even use the word *had* or *hudūd* in explaining the four types of crime agreed upon by *ulama* as *hudūd*, that is robbery (*hirabah)*, stealing, *zina*, and *qadzaf* (accussing someone to commit zina).

The general meaning of the word Allah's *hudūd* [limit] which consist of all Allah's prohibition and order also being emphasized by the exegetes in explaining the meaning of Allah's *hudūd* in Qur'anic verse al-Baqarah, 2:229.

217 Muhammad Fathi Osman, *Prakata* Kamali, *Hukuman,* p. 20

تِلْكَ حُدُودُ اللَّهِ فَلَا تَعْتَدُوهَا وَمَنْ يَتَعَدَّ حُدُودَ اللَّهِ فَأُولَئِكَ هُمُ الظَّالِمُونَ

"These are the limits of Allah, so do not transgress them. And whoever transgresses the limits of Allah - it is those who are the wrongdoers."

Ibn Asyur in his exegesis *at-Tahrir wa al-Tanwir* explains the meaning of Allah's *hudūd* in the following verse:[218]

وَحُدُودُ اللَّهِ اسْتِعَارَةٌ لِلْأَوَامِرِ وَالنَّوَاهِي الشَّرْعِيَّةِ بِقَرِينَةِ الْإِشَارَةِ، شُبِّهَتْ بِالْحُدُودِ الَّتِي هِيَ الْفَوَاصِلُ الْمَجْعُولَةُ بَيْنَ أَمْلَاكِ النَّاسِ، لِأَنَّ الْأَحْكَامَ الشَّرْعِيَّةَ، تَفْصِلُ بَيْنَ الْحَلَالِ وَالْحَرَامِ، وَالْحَقِّ وَالْبَاطِلِ وَتَفْصِلُ بَيْنَ مَا كَانَ عَلَيْهِ النَّاسُ قَبْلَ الْإِسْلَامِ، وَمَا هُمْ عَلَيْهِ بَعْدَهُ.

Similar with Ibn Asyur's explanation, Quraish Shihab explains that Allah's *hudūd* or the limits stipulated by Allah consist of two: His order and prohibition. All His orders and prohibitions should be in their own areas. These areas are called the limits of law. The two cannot be exchanged so that what is being ordered is being abandoned, while what is being prohibited is being done. If this is happening, then someone has put something in the wrong place and that is a tyranny. Therefore, the verse ends with the warning: whoever transgresses the limits of Allah - it is those who are the wrongdoers.[219]

The use of the word *had,* either literally or as used by the Qur'an, shows the concept of limit, the limit of what is being permitted and prohibited to do. However, the term *had* in *fiqh* is changing into a punishment being stipulated by God which cannot be changed. Consequently, the concept

218 Ibnu Asyur,*at-Tahrir,* Vol. 2, p. 413.

219 Shihab, *al-Mishbah,* Vol.1, p. 601.

of limit which separates and prevents is changing into the concept of fixed punishment.[220] The concept of *hudūd* as limit, not as fixed punishment, is better explained by Ziauddin Sardar when he discussed the relationship between Syari`ah and *hudūd*. According to him, Syari`ah law is like spiral which has its own limit, but it keeps moving following the time. The relevance of its norms for contemporary life must be understood by all Muslims in every generation. Syari`ah gives clear minimum and maximum limit for human behavior, which is called *hudūd.* Therefore, anything outside the limit is considered un-Islamic. *Hudūd* shows the outer limit of human behavior, it is not the norm.[221]

Hudūd as the concept of limit is also explained by Shahrour in a more detail which is known as the theory of law limit or the theory of limit or the theory of *hudūd*.[222] According to him, Islamic law has two characteristics: (1) permanent *(sabit)* which means fixed, unchangable and universal, which is also called *al-istiqamah* which means it is applicable generally and continously; (2) dynamic and tend to change (*al-hanifiyyah).* Based on these two characteristics of Islamic law, Shahrour categorises six principles of limit (*hudūd*) formed by the range from the combination between the open and the close curve in the x and y axis which shows the two characteristics of *al-istiqamah* and *al-hanifiyyah.*

1. *Al-Had al-a'la* (maximum limit) is the verses about *hudūd* which have only maximum limit, so the stipulation of the law can only be under the border line or under the maximum limit and cannot go beyond the maximum limit. The examples are the verses which explain the stealing in the Qur'anic verse al-Maidah, 5: 38, and murder in the Qur'anic verse al-Isra', 17: 33, and al-Baqarah, 2: 178.
2. *Al-Had al-adna* (minimum limit) is the verses about *hudūd* which have only minimum limit so the law can only be right on or above the

220 Kamali, *Hukuman*, p. 74.

221 Sardar, *Kembali,* p.120.

222 Muhammad Shahrur, *Al-Kitab wa AlQur'an; Qira'ah Mu'asirah* (Damaskus: al-Ahali li al-Tiba'ah wa an-Nasyr, 1999), p.579.

minimum limit and cannot go beyond this limit. The examples are the verses about women's dress in Qur'anic verse an-Nur, 24:31, the verses about women who are forbidden to be married in Qur'anic verse an-Nisa, 4:2 2-23, the verses about prohibited food in Qur'anic verse al-Maidah/5:3, and the verses about debt in Qur'anic verse al-Baqarah, 2: 283-284.

3. *Al-Hadain al-A'la wa al-Adna Ma'an* (maximum and minimum limit at the same time) is the verses about *hudūd* which have maximum and minimum limit so the stipulation of the law is between the two limits, or the law being produsedcan be right between the two limits. The examples are the verses about *hudūd* on inheritance in the Qur'anic verse an-Nisa, 4: 11-14 which contain the minimum limit for women and the maximum limit for men: women cannot be given less than the minimum limit and men cannot be given more than the maximum limit.
4. *Al-Had al-adna al-a'la ma'an fi nuqthatin wahidah* is the verses about *hudūd* whose maximum and minimum limits located in the same point so the maximum limit is identical with the minimum limit. The example is the verse about *hudūd* on the punishment of those who commit adultery in Qur'anic verse an-Nur, 24:2.
5. *Al-Had al-'ala li Had al-muqarib duna al-mamas bi had abadan* is the verses about *hudūd* located in the maximum limit which tend to be close but without contiguity except in the infinite area. The example is the verse about the prohibition of approaching *zina* in Qur'anic verse al-Isra, 17:32. The verse explains the prohibition of "approaching" something that can lead into committing *zina*. Approaching the "thing" is the minimum limit which cannot be breached.
6. *Al-Had al-'ala mujaban muqhallaqun la yajuzu tazawujuhu wa al-Had al-adna saliban yajuzu tajawuzuhu* (positive maximum limit position which cannot be breached and negative minimum limit which can be breached). This position can be described in the relationship between material and monetary cases. The two limits are located in usury as the positive maximum limit and alms as the negative limit. The maximum limit (usury) cannot be breached, but the minimum limit can be

breached, by giving charity. Because this position has two limits, the maximum limit which is in the positive area and the minimum limit which is in the negative area, the logical consequences of this position is that this position has middle limit (*munqatul in'itaf*) located between the two limits. The example is the verse on alms in Qur'anic verse al-Taubah, 9:60. This verse explains the concept of alms which should be given to those mentioned by Allah in that verse. However, for Shahrur, alms is the minimum limit for the wealth that should be distributed. The form of wealth that can reach beyond the alms limit is called charity.

The concept of *had* or *hudūd* as limit, explained by either Ziauddin Sardar or Shahrour, has essential differences from the concept of *had* or *hudūd* as developed by *fuqaha*. The first difference can be seen in the scope of *hudūd* in which the *fuqaha* only limit it on verses (and hadith) on criminal law, while Ziauddin Sardar and Shahrour see the concept of *hudūd* is not only limited with the criminal law but also personal law such as inheritance. The second difference is on the absence and the availability of room for *ijtihad* in what is understood as *hudūd* in which the *fuqaha* believe that there is no room for *ijtihad* in the verses on *hudūd*, while Sardar and Shahrour give room for *ijtihad* as long as it is within the limit given by Allah. This can be seen, for example, in the punishment of cutting the hands for the thefts. Shahrour and Sardar give room for *ijtihad* to decide other forms of punishment which do not go beyond cutting the hands, while the *fuqaha* see that as part of the *hudūd* crime, the punishment for the thefts must be hand cutting.

Sardar and Shahrour are only some of the contemporary scholars who try to reinterpret the concept of *hudūd*. As explained by Hashim Kamali, the classical *fuqaha* actually have different opinion on *hudūd,* such as on the number of crimes categorised in *hudūd*. Similarly, the discussion on Chapter IV on the Portrait of the Implementation of *hudūd* also shows different opinion in many cases of *hudūd* in the Islamic criminal law of Pakistan, Sudan, Kelantan Malaysia, and Brunei Darussalam. Therefore, re-interpreting the concept of *hudūd* is not only possible but it has been undertaken since the classical era, and this effort is still going on up until

now. One of the forms of *hudūd,* which causes controversy since the classical era up until now is *rajm* for those who committed adultery (*muhshan*).

Reinterpretation of the concept of *hudūd* which is different from that of the classical *fiqh* invites sharp criticism. However, these findings help overcome the misuse of Syari`ah law for a different purpose through the implementation of *hudūd*. The problem of claiming that the implementation of *hudūd* is based on the text to some extent can be resolved, but the real problem in reality is actually the battle for and the preservation of political authority. *Rajm* is the example. Even though there has been a heated debate for a long period of time about *rajm*, many modern countries apply this punishment at the same time with the implementation of Syari`ah law.

C. The Validity of *Rajm*

Rajm, stoning to death for those who commit adultery or the persons who are married (*muhshan),* has been a topic of heated debate among ulama since the classical era. The validity of *rajm* is based on the verse whose text has been abrogated but its law still exists:

الشيخ والشيخة إذا زنيا فارجموهما البتة نكالاً من الله
والله عزيز حكيم

If a married man and married woman are committed adultery, stone to death as prevention from Allah, and Allah is the Exalted in Might and Wise

The above verse is based on several narrations which state about the loss of the verse about *rajm* which had been written on the leaf and then was eaten by a ghoat or insects in other narrations. This argument was criticized by many scholars such as Asghar Ali Engineer because it is contradictory with Qur'anic verse al-Hijr, 15:9.

إِنَّا نَحْنُ نَزَّلْنَا الذِّكْرَ وَإِنَّا لَهُ لَحَافِظُونَ

Indeed, it is We who sent down the Qur'an and indeed, We will be its guardian.

In addition, this hadith is contradictory with the historical fact that the Qur'an had been memorized by its writers since the Messenger's life era so that recitation became the primary source, while records were the secondary source. The loss of record of a Qur'anic verse did not remove the recitation of the verse. Furthermore, the reason that there is another category of Qur'anic verse which has been nullified but its law stil exists is exaggerating reason. If the text has been nullified, why its law still exist and if the law is still applicable why its text is nullified? In other words, the hadith is unreliable.

Another argument is that there are hadith which explain that the Messenger pbuh also had applied *rajm* for married couple who committed *zina.* Hashim Kamali examined the six hadith on *rajm* in *Nail al-Authar* written by asy-Syaukani. He found that these six hadith are contradictory with each other on whether or not the Messenger pbuh combined between flogging and *rajm* so that the value of the hadith does not reach reliable position.[223]

The practice of *rajm* punishment informed by these hadith was being questioned on its relation with the flogging punishment for those who commit adultery (an-Nur, 24:2). According to the supporters of *rajm*, the verse on flogging punishment for those who commit *zina* is general, while the hadith on *rajm* for married people who commit adultery is specific (the specification of the verse which is general in nature). This reason was rejected because *rajm* or stoning to death is a harsh punishment which is not written in the Qur'an. If the hadith legalizes *rajm*, it goes beyond what is stated in the Qur'an, that is flogging, then it is not specification but nullification: the nullification of flogging punishment for those who committed *zina*, being replaced with *rajm*. The reason for the nullification is also rejected because the hadith is the secondary source after the Qur'an which only has the authority to explain, not to nullify.

Rajm had existed before the Messenger pbuh was sent. The practice of *rajm* might be undertaken before the revelation of the verse about flogging so that the verse an-Nur, 24: 2 is nullifying the punishment of *rajm* for

223 Kamali, *Hukuman,* p. 119-121.

adulterer (*muhshan)* which had been practised by the Messenger pbuh. The Qur'an does not mention at all about the *rajm* punishment. Initially, the Qur'an mentiones about the punishment for female adulterer is to be confined at the house until her death or until Allah makes another decision, while the punishment for male adulterer was not being specified, as written in Qur'anic verse an-Nisa, 4: 15-16.

وَاللَّاتِي يَأْتِينَ الْفَاحِشَةَ مِنْ نِسَائِكُمْ فَاسْتَشْهِدُوا عَلَيْهِنَّ
أَرْبَعَةً مِنْكُمْ فَإِنْ شَهِدُوا فَأَمْسِكُوهُنَّ فِي الْبُيُوتِ
حَتَّىيَتَوَفَّاهُنَّ الْمَوْتُ أَوْ يَجْعَلَ اللَّهُ لَهُنَّ سَبِيلًا

Those who commit unlawful sexual intercourse of your women - bring against them four [witnesses] from among you. And if they testify, confine the guilty women to houses until death takes them or Allah ordains for them [another] way. And the two who commit it among you, dishonor them both. But if they repent and correct themselves, leave them alone. Indeed, Allah is ever Accepting of repentance and Merciful.

Quraish Shihab explains the word *fahisyah* in the above verse to include *zina* and same sex sexual relationship, between women and women and between men and men.[224] Thahir Ibnu Asyur explaines that this verse is about the punishment for adulterer: confinement in the house for a woman until her death or Allah gives her another way out from the house. This verse – according to some ulama- was abrogated by the Qur'anic verse an-Nur, 24: 2 which instructs to flog the female and male adulterer with 100 flogging and this punishment is called the clarifier of the sentence "Allah ordains for them [another] way" stated in verse an-Nisa 4: 15.[225] This verse does not mention at all about *rajm* as the punishment for those who commit *fahisyah*.

Rajm punishment is also viewed as contradictory with an-Nisa 4: 25 about the punishment for adulterer who is slave.

224 Shihab, *al-Misbah,* j. 2, h.451.

225 Ibnu Asyur, *at-Tahrir wa at-Tanwir,* j. 4, p. 269

وَمَنْ لَمْ يَسْتَطِعْ مِنْكُمْ طَوْلًا أَنْ يَنْكِحَ الْمُحْصَنَاتِ
الْمُؤْمِنَاتِ فَمِنْ مَا مَلَكَتْ أَيْمَانُكُمْ مِنْ فَتَيَاتِكُمُ الْمُؤْمِنَاتِ
وَاللَّهُ أَعْلَمُ بِإِيمَانِكُمْ بَعْضُكُمْ مِنْ بَعْضٍ فَانْكِحُوهُنَّ بِإِذْنِ
أَهْلِهِنَّ وَآتُوهُنَّ أُجُورَهُنَّ بِالْمَعْرُوفِ مُحْصَنَاتٍ غَيْرَ
مُسَافِحَاتٍ وَلَا مُتَّخِذَاتِ أَخْدَانٍ فَإِذَا أُحْصِنَّ فَإِنْ أَتَيْنَ
بِفَاحِشَةٍ فَعَلَيْهِنَّ نِصْفُ مَا عَلَى الْمُحْصَنَاتِ مِنَ الْعَذَابِ
ذَلِكَ لِمَنْ خَشِيَ الْعَنَتَ مِنْكُمْ وَأَنْ تَصْبِرُوا خَيْرٌ لَكُمْ وَاللَّهُ
غَفُورٌ رَحِيمٌ

And whoever among you cannot [find] the means to marry free, believing women, then [he may marry] from those whom your right hands possess of believing slave girls. And Allah is most knowing about your faith. You [believers] are of one another. So marry them with the permission of their people and give them their due compensation according to what is acceptable. [They should be] chaste, neither [of] those who commit unlawful intercourse randomly nor those who take [secret] lovers. But once they are sheltered in marriage, if they should commit adultery, then for them is half the punishment for free [unmarried] women. This [allowance] is for him among you who fears sin, but to be patient is better for you. And Allah is Forgiving and Merciful.

The above verse emphasizes that the punishment for slave adulterer is half of the punishment of free people (not slaves). If the punishment for adulterer is *rajm*, then the punishment for slave adulterer is half of *rajm*. *Rajm* as a punishment of stoning to death is impossible to be divided into two.

Rajm is also regarded to be contradictory with the verse al-Ahzab 33: 30:

يَا نِسَاءَ النَّبِيِّ مَنْ يَأْتِ مِنْكُنَّ بِفَاحِشَةٍ مُبَيِّنَةٍ يُضَاعَفْ لَهَا
الْعَذَابُ ضِعْفَيْنِ وَكَانَ ذَلِكَ عَلَى اللَّهِ يَسِيرًا

O wives of the Prophet, whoever of you should commit a clear immorality - for her the punishment would be doubled two fold, and ever is that, for Allah, easy.

The above verse explains that the punishment for the wives of the Prophet if they commit *fahisyah* is doubled of the wives of other men who are not prophet. If the punishment for adulterers who are not the wives of the Prophet is *rajm*, then how to give double punishment to the wives of the Prophet because *rajm* cannot be doubled?

Rajm is also rejected for the reason of language. The Arabic word of having sexual relationship out of wedlock committed by unmarried and married people is the same, *zina*. The different term for sexual relationship out of wedlock can only be differentiated if it is undertaken by force, *zina bil-jabr*. According to Engineer, the heavier punishment given to married people may be caused by three reasons: (1) the institution of marriage has given married people enough opportunity to enjoy sexual relationship, (2) *zina* committed by married people destroy the institution of marriage, (3) *zina* undermines the contract which binds husband and wife to be faithful with each other in their sexual relationship.[226] Thus, the punishment of *rajm* is the genuine thinking of the judge which can be categorised as *ta'zir* (warning). However, *ta'zir* should not be heavier than the punshiment stipulated directly by the Qur'an, while *rajm* is certainly heavier than 100 times of flogging.

This alternative interpretation may be considered by policy makers in modern countries. The institution of marriage must be strongly protected because it is the foundation of the state. Betrayal to the institution of marriage and family should be prevented as early as possible by having a marriage which is planned and expected by parties involved in it (not forced marriage), in a matured age physically and mentally *(aqil baligh)*, not child marriage. Similarly, marriage system which provides consultation services, education, information and mediation of marital problems should be provided to prevent from betrayal of the marriage. One of the challenges in protecting the marriage and family is to build equal relation between

226 Engineer,*Islam dan Teologi Pembebasan*, p. 263

husband and wife and between parents and children just as equal they are as between the servants and the caliphate in this world so that they can understand, love, protect and cooperate with each other in their family affairs. Equal gender relation can be a challenge in understanding women's position in the implementation of *hudūd*.

D. The Value of Female Witnesses

One of the crucial problems in the implementation of *hudūd* is the value of female witness which is ignored, or is only valued as half the value of male witness. This understanding is based on Qur'anic verse. al-Baqarah, 2:282.

يَا أَيُّهَا الَّذِينَ آمَنُوا إِذَا تَدَايَنْتُمْ بِدَيْنٍ إِلَى أَجَلٍ مُسَمًّى
فَاكْتُبُوهُ وَلْيَكْتُبْ بَيْنَكُمْ كَاتِبٌ بِالْعَدْلِ وَلَا يَأْبَ كَاتِبٌ أَنْ
يَكْتُبَ كَمَا عَلَّمَهُ اللَّهُ فَلْيَكْتُبْ وَلْيُمْلِلِ الَّذِي عَلَيْهِ الْحَقُّ
وَلْيَتَّقِ اللَّهَ رَبَّهُ وَلَا يَبْخَسْ مِنْهُ شَيْئًا فَإِنْ كَانَ الَّذِي
عَلَيْهِ الْحَقُّ سَفِيهًا أَوْ ضَعِيفًا أَوْ لَا يَسْتَطِيعُ أَنْ يُمِلَّ هُوَ
فَلْيُمْلِلْ وَلِيُّهُ بِالْعَدْلِ وَاسْتَشْهِدُوا شَهِيدَيْنِ مِنْ رِجَالِكُمْ
فَإِنْ لَمْ يَكُونَا رَجُلَيْنِ فَرَجُلٌ وَامْرَأَتَانِ مِمَّنْ تَرْضَوْنَ مِنَ
الشُّهَدَاءِ أَنْ تَضِلَّ إِحْدَاهُمَا فَتُذَكِّرَ إِحْدَاهُمَا الْأُخْرَى وَلَا
يَأْبَ الشُّهَدَاءُ إِذَا مَا دُعُوا وَلَا تَسْأَمُوا أَنْ تَكْتُبُوهُ صَغِيرًا
أَوْ كَبِيرًا إِلَى أَجَلِهِ ذَلِكُمْ أَقْسَطُ عِنْدَ اللَّهِ وَأَقْوَمُ لِلشَّهَادَةِ
وَأَدْنَى أَلَّا تَرْتَابُوا إِلَّا أَنْ تَكُونَ تِجَارَةً حَاضِرَةً تُدِيرُونَهَا
بَيْنَكُمْ فَلَيْسَ عَلَيْكُمْ جُنَاحٌ أَلَّا تَكْتُبُوهَا وَأَشْهِدُوا إِذَا تَبَايَعْتُمْ
وَلَا يُضَارَّ كَاتِبٌ وَلَا شَهِيدٌ وَإِنْ تَفْعَلُوا فَإِنَّهُ فُسُوقٌ بِكُمْ
وَاتَّقُوا اللَّهَ وَيُعَلِّمُكُمُ اللَّهُ وَاللَّهُ بِكُلِّ شَيْءٍ عَلِيمٌ

O you who have believed, when you contract a debt for a specified term, write it down. And let a scribe write [it] between you in justice. Let no scribe refuse to write as Allah has taught him. So let him write and let the one who has the obligation dictate. And let him fear Allah, his Lord, and not leave anything out of it. But if the one who has the obligation is of limited understanding or weak or unable to dictate himself, then let his guardian dictate in justice. And bring to witness two witnesses from among your men. And if there are not two men [available], then a man and two women from those whom you accept as witnesses - so that if one of the women errs, then the other can remind her. And let not the witnesses refuse when they are called upon. And do not be [too] weary to write it, whether it is small or large, for its [specified] term. That is more just in the sight of Allah and stronger as evidence and more likely to prevent doubt between you, except when it is an immediate transaction which you conduct among yourselves. For [then] there is no blame upon you if you do not write it. And take witnesses when you conclude a contract. Let no scribe be harmed or any witness. For if you do so, indeed, it is [grave] disobedience in you. And fear Allah. And Allah teaches you. And Allah is Knowing of all things.

Generally the classical exegetes accepted the value of female witness in this verse as the truth that can be accepted, not to be questioned. The awareness that the word of Allah is beyond time and place has significant influence in this way of understanding. Therefore, the explanation is more directed to answer the question on whether the value of female witness should be half the value of male witness. According to al-Jurjawi, in facing the problem, men tend to use their thinking, while women tend to use emotion. The eagerness of women is weak, their thinking is rarely used to solve the complicated problems, especially when they are annoyed, angry, happy or sad because of small matter, while men are strong, capable, resilient and patient in facing difficulties. They do not decide an affair only after their careful thinking. The affair of human relation (*mu'amalah*) is an issue which needs careful thinking more than emotion. A witness in *mu'amalah* also acts as an arbitrator among those who have made a contract if they have any disputes in the future.[227]

227 Ali Ahmad aj-Jurjawi, *Hikmatu at-Tasyri' wa Falsafatuhu* (Jeddah: al-Haramain, t.th.), j.1, h.162-163, j.2, h.150-154.

According to al-Baidawi, in the cases of non-cash loan receivables, the witness for writing the contract about the time of payment is two Muslim men who are matured and fair. Two women can only play as witnesses if there is no male witness, and the criteria for female witness are also the same with that of a male: she must be a Muslim, matured and fair. As al-Jurjawi, al-Baidawi also mentions six excellences of male witness in compare with the female witness: (1) Allah creates the origin and its branch, just like the creation of men and women, 2) women are created from the male rib, 3) women are lack of religion, 4) women are lack of reason, 5) women receive less inheritance than men, and 6) women are lack of strength.[228] Similar with al-Jurjawi and al-Baidawi, Ibnu Kasir argues that the value of female witness is half that of male because of women's lack of reason (*bi nuqsani aqlihinna*) and because it is men who usually become witness.[229]

Ibnu Kasir relates the values of female witness with the Arab society tradition in which men become witness in various aspects. Qur'anic verse al-Baqarah, 2:282 is indeed about the tradition of Arab society as described by the narration, which becomes the background of the revelation of the verse. Adz-Dzahabi writes that when the Messenger pbuh arrived at Madinah for the first time, the indigenous people there usually leased their plantation for the duration of one, two or three years. Therefore the Messenger pbuh told people:"Whoever leases something, it is better to have the exact amount and the exact period." On this issue, Allah Swt revealed the verse al-Baqarah: 282 as an instruction that when people are involved in loan receivables (*muamalah*) in certain period of time, it is better to write a contract and this contract writing is attended by witness to prevent any dispute in the future.[230]

Unlike classical scholars, contemporary Muslim scholars regard female witness in the verse as the social function of women at that time. Asghar Ali Engineer argues that the verse is a contextual verse or the verse which is

228 Al-Baidawi, *Al-Anwar al-Tanzil wa Asrar al-Ta'wil* (Beirut : Dar al-Fikr, t.th), j. 1, p. 270.

229 Ibnu Kasir, *Tafsir Al-Qur'an al-'Azim* (Beirut: Dar al-Kutub al-'Ilmiyyah, 1994), j.1, h.308.

230 Muhammad Husain al-Dzahabi, *At-Tafsir wa al-Mufassirun*, (Mesir: Dar al-Kutub hadisah, 1976), h.70-71.

related with the context of revelation, not a normative verse. According to him, even though the verse suggests to have two female witnesses to replace a male witness, only one of the two women becomes the witness, while another one reminds the female witness if she is in doubth in giving her testimony (because of her lack of experience on financial matters). The Qur'an does not intend to set the norm that on the issue of witness, two women are regarded as the same with one man. If this is so, then whenever there is a need for witness, the Qur'an would treat the women in the same way. However, there are seven verses in the Qur'an on witness, but none of the verses require two female witnesses to replace one male witness as written in the Qur'anic verse al-Baqarah, 2:282. These verses are: Qur'anic verse al-Maidah, 5:106 and 107 (witnesses in writing a will), an-Nisa, 4:15 (witnesses of *zina*), an-Nur, 24: 4 (*zina*), 6 (*zina* accusation [*qadzaf*]), 8 (*li'an*), and ath-Thalaq, 65:2 (divorce and remarriage).[231]

Similar with Engineer, Amina Wadud argues that according to the sentence structure of the verse, the two women in the verse do not become witness because another woman is instructed to "remind" the other woman. She acts as collaborator. Thus, even though there are two women, they have different functions. This is especially for financial contract, not applicable for general matters, or not applicable for other matters.[232] Fazlur Rahman argues that the social development in the society allows women to be involved in various public affairs, including to gain higher education, to work in various sectors, and even become the head of the state. Therefore, the opinion which states that women are forgetful so that the value of their testimony is half of that of men needs to be reconsidered.[233]

Even though the verse which explicitly states that the value of female witness is half that of male witness is only one among other eight verses on witness, this one verse represents Arabic tradition in treating women.

231 Engineer, *Hak-Hak Perempuan dalam Islam,* p. 98-107

232 Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (New York: Oxford University Press, 1999), pp. 85.

233 Fazlur Rahman, *Tema Pokok Al-Qur'an*, trans. Anas Mahyuddin (Bandung: Pustaka, 1983), pp. 70-71.

Therefore, the stipulation of the value of female witness is subordinate to that of male witness in all cases, the prohibition of women to become the witness in the criminal cases for example, reflect the Arabic tradition which is intended to be changed by the Qur'an with the new value of the Qur'an: that is to acknowledge that the value of female witness is the same with male witness, something which is acceptable in the current era.

E. The Abortion for Victims of Rape

Abortion is an act undertaken to solve the unwanted pregnancy. Such pregnancy can be experienced by married or unmarried women. A woman can experience unwanted pregnancy because of various reasons such as health and economics reason and rape. For example, a woman may be sick and her pregnancy can endanger her life, or she has already had many children while she has only limited resources to feed the children, or even because she is pregnant after being raped.

There seem to be more married women than unmarried ones who commit abortion. This is because married women have more access to permissible sexual relationship. Every sexual relationship is potentially causes pregnancy, while not every sexual relationship wanted by husband and wife is expected to end with pregnancy. If every sexual relationship between husband and wife always end with pregnancy, then every husband and wife who are reproductively productive will experience the cycle of having sexual relationship, being pregnant, giving birth, parturition, breastfeeding and after finishing breast feeding, the woman will be pregnant again after having sexual relationship and this cycle continuous throughout their marriage life.

The high risk of pregnancy as explained above is one of the causes for unwanted pregnancy by married couple. Unwanted pregnancy can also be caused by women who are sick, poor but they have already had many children and other causes. Contraception is to prevent pregnancy after having sexual relationship by preventing sperm from entering ovum. Contraception is to prevent unwanted pregnancy. If this pregnancy cannot be prevented, abortion is undertaken to solve this problem [of unwanted pregnancy]. Thus, the main difference between using contraception and having abortion

is that by using contraception, the sperm does not enter the ovum yet, while abortion is undertaken after the sperm enter the ovum.

Muslim scholars have different opinion either on using contraception or having abortion. This different opinion is based on their different way of seeing the two cases. The two main reasons are whether or not using contraception and having abortion are acts against the destiny of God; and whether or not these acts are the acts of killing the children. The scholars who prohibit using contraception and having abortion see that these two acts are against the destiny of God and at the same time are killing the children, which are prohibited in the Qur'an, Qur'anic verses al-An'am/6:151 and al-Isra/17:31. In contrast, the scholars who allow using contraception see that using contraception is not an act against the destiny of God. The fact that pregnancy can be prevented and be aborted shows that this matter is part of human efforts (choices). Some of the human choices are permitted and others are prohibited depending on the circumstances, but this act is not against the destiny of God. Using contraception is not an act of killing the children because the sperm does not enter the ovum yet so that it is not in the form of children yet. The case of abortion will depend on the age of fetus, whether or not it can be regarded as child (human) so that abortion can be categorised as an act of killing.

In Islam, the well-known method of contraception is *azl,* to release the sperm outside the vagina to prevent pregnancy. In modern term it is called *coitus interruptus*. Muslim scholars have different opinion on *azl* which reflects the different opinion on using contraception in general with the following reasons:

1. The School of Syafi'i: allows (*mubah*) *azl* but consider it to be unethical because the sperm is not being used well. It is permitted to protect the life of a wife from the risk of giving birth or to prevent too much burden *(katsrah al-haraj)* because of having too many children or economic difficulty.[234]
2. The School of Hanafi: regards *azl* as reprehensible (*makruh*) without the permission of the wife because sexual relationship ended with ejaculation

234 Al-Ghazali, *Ihya Ulumuddin*, j. 2, h.52

is the cause of pregnancy and women have the rights to have children. *'Azl* prevents women from being pregnant and having children.[235]

3. The School of Maliki: a man does not have the right to practise '*azl* without his wife's consent.[236]
4. The School of Hambali: '*azl* without any reason is reprehensible but it is not prohibited. *'Azl* cannot be practised without the wife's permission.[237]

Muslim scholars have different opinion on when the fetus is regarded as human which is rooted from the different ways of understanding the verse on the creation of human stated among others in Qur'anic verse al-Mu'minun, 23:12-14.

وَلَقَدْ خَلَقْنَا الْإِنْسَانَ مِنْ سُلَالَةٍ مِنْ طِينٍ (٢١) ثُمَّ جَعَلْنَاهُ نُطْفَةً فِي قَرَارٍ مَكِينٍ (٣١) ثُمَّ خَلَقْنَا النُّطْفَةَ عَلَقَةً فَخَلَقْنَا الْعَلَقَةَ مُضْغَةً فَخَلَقْنَا الْمُضْغَةَ عِظَامًا فَكَسَوْنَا الْعِظَامَ لَحْمًا ثُمَّ أَنْشَأْنَاهُ خَلْقًا آخَرَ فَتَبَارَكَ اللَّهُ أَحْسَنُ الْخَالِقِينَ (٤١)

And certainly did We create human from an extract of clay. Then We placed him as a sperm-drop in a firm lodging. Then We made the sperm-drop into a clinging clot, and We made the clot into a lump [of flesh], and We made [from] the lump, bones, and We covered the bones with flesh; then We developed him into another creation. So blessed is Allah, the best of creators.

In explaining the following verse, Muslim scholars refer to the rellevant hadith.

235 'Alau ad-din Abi Bakar bin Mas'ud al-Kasani, *Badai' asSanai' fi at-Tartibi asy-Syara'i* (Beirut: Dar al-Fikr, 1996), v. 2, p. 334.

236 Malik bin Anas, *Al-Muwattha'* (Beirut: Dar al-Fikr, v.2, p. 77.

237 Ibnu Qudamah, *Al-Mughni*, v. 7, p. 23.

عَنْ عَبْدِ اللَّهِ قَالَ حَدَّثَنَا رَسُولُ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ وَهُوَ الصَّادِقُ الْمَصْدُوقُ إِنَّ أَحَدَكُمْ يُجْمَعُ خَلْقُهُ فِي بَطْنِ أُمِّهِ أَرْبَعِينَ يَوْمًا ثُمَّ يَكُونُ فِي ذَلِكَ عَلَقَةً مِثْلَ ذَلِكَ ثُمَّ يَكُونُ فِي ذَلِكَ مُضْغَةً مِثْلَ ذَلِكَ ثُمَّ يُرْسَلُ الْمَلَكُ فَيَ نْفُخ فِيهِ الرُّوحَ....

From Abdillah who stated that the Messenger pbuh told us: Actually each of you is being combined in the womb of your mother for 40 days and then you become a clot in the same period of time and then you become a lump of flesh in the same period of time and then the angel would generate you with the spirit (HR. Muslim).[238]

The above verse and hadith show four stages of the creation of human being in the womb of a woman: in the form of sperm and ovum for 40 days, in the form of a clot for 40 days, and in the form of a lump of flesh for 40 days, and the generating spirit after 120 days. The decision about abortion which is being debated by Muslim scholars is rooted on when it can be undertaken during these four stages.

1. The school of Hanafi allows abortion before the stage of generating the spirit (before 120 days) on condition that the pregnancy can cause the stop of breast milk needed by the baby, while the father is unable to provide the replacement of breast milk for the baby, or the pregnant woman is sick so that she is threatened to death if she is pregnant as happened in her previous pregnancy.
2. The school of Maliki prohibits abortion before 40 days of pregnancy except to save the life of the pregnant woman.
3. The school of Hanafi allows abortion before 40 days of pregnancy, and some other Hanafi scholars allow abortion before 120 days of pregnancy.
4. The school of Syafi'i prohibit abortion before 120 days of pregnancy, but there are some other Syafi`i scholars who allow abortion when the baby

238 Muslim, *Shahih Muslim,* j. 13, p. 100.

is still in the form of a clot and a lump of flesh (80 days), and some other scholars allow abortion before 120 days of pregnancy.[239]

The different opinion on abortion is only applicable for married women, not for women who are pregnant out of wedlock because the scholars agreed that sexual relationship out of wedlock is *zina*, which is prohibited. The problem is whether the women who are pregnant because of being raped are regarded to be the same with women who are pregnant because of committing *zina*.

When there was mass rape experienced by Bosnian Muslim women by Serbian armies, there was a debate on whether the victims of rape can have abortion. According to Yusuf al-Qaradlawi:

1. Originally, abortion is prohibited since the fetus has been generated with the spirit in the womb even though the pregnancy is caused by *zina*.
2. Some ulama allow abortion before the fetus is 40 days, some other ulama allow abortion before the fetus is being generated with the spirit (120 days). However, if there are more disadvantages if the abortion is undertaken before 120 days, then it is better to do so before 40 days of pregnancy.
3. There is no doubt that the rape of free Muslim women committed by the cruel enemies is the strong reason for Muslim women and their families to have abortion because of the hatred to the fetus so that abortion is permitted soon after the rape due to emergency reason.
4. Muslim women who are raped can also continue their pregnancy by choice and the baby born from this pregnancy is Muslim or to have abortion if they choose to do so.[240]

The above Yusuf al-Qaradlawi's opinion (*fatwa*) is similar with the *fatwa* of Majlis Ulama Indonesia/MUI (Indonesia Council of Muslim Scholars) No. 4 Tahun 2005 on abortion. According to this *fatwa*, abortion is

239 Maria Ulfah Anshor dan Abadullah Ghalib, *Fiqh Aborsi: Review Kitab Klasik dan Kontemporer* (Jakarta: Mitra Inti, FF, FNU, 2004), p. 33-46.

240 Yusuf al-Qaradlawi, *Fatawa Mu'ashirah* (t.tp.: Dar al-Wafa, 1994), j.2, p. 611-612.

prohibited (*haram*) since the implantation of the *blastosis* in the wall of the uterus. Abortion is permitted only because there is reason, either emergency (if abortion is not undertaken the pregnant woman would die or about to die) or urgent need (without abortion, there will be many difficulties. Emergency abortion is when a pregnant woman has serious illnesses such as cancer, tuberculosis/TBC and other serious illnesses which threaten the life of the pregnant woman identified by medical doctor team. The abortion undertaken because of urgent need for example is when the fetus is detected to have genetic defect which would be difficult to be recovered after being born, or pregnancy because of rape which is decided by the relevant authorities such as the victim's family, medical doctor and the ulama. Abortion because of the urgent need should be undertaken before the fetus is 40 days. The fatwa of MUI emphasizes that abortion because of *zina* is prohibited.

This MUI fatwa is used to draft the Republic Indonesia Government Regulation (*Peraturan Pemerintah Republik Indonesia*) No. 61 Year 2014 on Reproductive Health. On abortion, this Regulation Article 31 (1 and 2) states that abortion can be undertaken based on the indication of medical emergency or pregnancy because of rape. Abortion because of rape can only be undertaken before the 40 days of pregnancy.

1. The above MUI fatwa and Government Regulation on Reproductive Health show that:
2. Sexual relationship experienced by female victims of rape is not regarded as *zina*.
3. Pregnancy of female victims of rape is not the same with the pregnancy because of *zina*.
4. The provision for abortion undertaken by female victim of rape is not the same with the provision of abortion for pregnancy caused by *zina*.

F. Reconsidering Flogging as a Punishment

Sa'ad bin Sa'd bin Ubadah tells that in his home, there is a weak small man. One day this weak man was committed *zina* with one of the slaves of the family. This incidence was reported to the Messenger. The Messenger answered: "Flog him as a *had* of *zina*". Knowing the Messenger's decision,

the family of Sa'ad told the Messenger: "Dear the Messenger, he is so weak". This means that he would not be strong enough to be flogged 100 times. The Messenger told: "Take one stem of the date palm which has 100 sticks and flog him once". Listening to this solution, the family of Sa`ad executed this punishment.[241]

Similar case also occurred in the era of the Prophet Job (Ayub) pbuh who was tested by God with poverty and serious illness so the Prophet relied on his wife's help. One day he was angry because his wife was late in fulfilling his request. His wife came home with food. The Prophet Job asked: "Where do you get the food from?" It was told that his wife answered that she had sold some of her hair. Knowing this, the Prophet Job was angry and promised that when he had been recovered he would flog his wife with stick 100 times. After the Prophet Ayub recovered, he was no longer angry with his wife. He felt pity on her if he hits his wife who has accompanied and looked after him during his illness. Allah then gave him solution by instructing the Prophet Job to gather a bundle of grass which consists of 100 blades and strike his wife once. This case is written in Qur'an Qur'anic verse Shad, 38: [44].

> And take in your hand a bundle of thin grass and strike therewith (your wife), and break not your oath. Truly! We found him patient. How excellent (a) slave! Verily, he was ever oft-returning in repentance (to Us)!

The two cases written in the above hadith and the Qur'anic verse give very important lesson for anybody especially policy makers. First, giving punishment must be based on fair law, legal policy and legal certainty. *Second*, legal policy and legal certainty must become the main reference in giving punishment. Legal certainty can be modified in such a way in order to ensure justice and wisdom as the spirit and the objective of the implementation of the law. The above Prophetic tradition (hadith) shows that flogging does not necessarily use rattan, but it can use any other tools

241 Abi al-Fadl Ahmad bin Ali bin Hajar al-Asqalani, *Bulugh al-Maram min Adillati al-Ahkam* (Bairut: Dar al-Fikr, 1989), p. 259.

including the date palm. The Qur'an explicitly explains that the tool to flog can be a bundle of thin grass. This shows that the purpose of flogging is not to hurt and even more to harm the physic of those who committed immoral acts but to educate them in order they do not commit the same immoral acts. This is the wisdom and the spirit of law. Without wisdom, the law will lost its spirit. Giving punishment, judge, law and wisdom are the four chains which cannot be separated because these four aspects come from the same root: "*hakama al-hakim hukman hikmatan*" which means the judge decides the law with wisdom.

In his exegesis, al-Alusi explains the different opinion of ulama in understanding the above Qur'anic text. Some of the ulama suggest that even 100 times of flogging can be modified into once or twice, but it is required that the strike inflicts pain in order to have deterrent effect. Some of the ulama have different opinion on whether the modification of punishment was only specific to the Prophet Job, or it is applicable in general for unlimited time. Asy-Syafi'i, Abu Hanifah, and Zufar argue that this modification is not only for the Prophet Job but also for all humans. If anyone swears to hit his wife 100 times and he modifies it with one strike of 100 blades of grass, then he is regarded to have implemented his swear.[242]

The above case also gives a good model on how the literal text should be related into the aims of Syari`ah *(maqhasid asy-syari`ah)*). The literal Qur'anic text states that the punishment for adulterer is flogging 100 times. However, if 100 times of flogging is harmful and does not show any justice, then the practice of flogging can be modified with the aim of Syari`ah on flogging. Therefore, the Messenger pbuh did not instruct to flog 100 times, and the Prophet Job did not flog 100 times, but once which symbolically represents 100 times. This rejects the view that the text which has definite injunction *(qath'iyy ad-dalalah)* cannot be interpreted in order to connect its values with the need and the welfare of people. The number 100 is fixed *(qath'i)* and does not change, but how to execute 100 times [of flogging]

242 Mahmud Syihabuddin Al-Alusi, *Ruh al-Ma'ani fi Tafsir Al-Qur'ani al-Adhim wa as-Sab'i al-Matsani* (Beirut: Dar al-Kutub al-Ilmiyah, 2001), v. 17, p. 257.

is open to *ijtihad*. In the principles of Islamic Jurisprudence (*ushul fiqh*), *ijtihad bi takhriji al-manath* can stop when *nash qath'i* can no longer be re-interpreted, but *ijtihad bi tahqiqi al-manath* from the stipulation resulted from *ijtihad bi tahkriji al-manath*, still need room for *ijtihad* to be grounded in the appropriate context.

The efforts did by the Prophet actually were not only modifying the type of punishment but also trying how to avoid corporeal punishment and encouraging individual and social repentance to God. Abu Hurairah narrated that one day when the Messenger was in the mosque, a man came and informed the Prophet: "Dear the Messenger, I have committed adultery". The Messenger seemed to try to ignore that confession. The man was approaching the Messenger again and told him: "Dear the Messenger, I have committed adultery". The Messenger ignored that confession again. This was repeated four times. Seeing that the Messenger ignored his confession, the man swore four times that he has committed adultery. Responding to his swearing, the Messenger asked: "Are you insane?" The man answered: "No". The Messenger asked again: "Are you married?" The man answered, "Yes, Messenger". Ibnu Abas also narrated that when Ma'iz bin Malik came to the Prophet and confessed that he had committed adultery, the Prophet asked him: "May be you just kissed her or you just be on top of her or you just see her?". The man answered, "No, I was really committed adultery. When the man answered "no" to the Messenger's question, the Messenger asked his companions to stone him to death (HR. Bukhari).[243]

The question is why the Messenger ignored the confession of that man four times, why when the man has confessed four times the Prophet still asked about the state of his mentality and his social condition, why the Prophet was checking on the possibility that the man might only kiss, or be on top of the woman or see her. There are several messages behind the Messenger's attitudes. *First,* the Messenger wanted to remind that immoral acts should not be announced in public, but only be confessed in the heart between the person and God. *Second*, mental and social condition must be considered in

243 Al-Alusi, *Ruh al-Ma'ani,* v. 17, p. 257.

giving punishment. *Third*, it is suggested that the person withdraw his or her confession that they have committed immoral acts especially on the immoral acts related with the rights of Allah. Indirectly, the Messenger prohibitted Muslims from doing anything which was contradictory with the main message of that hadith. The Messenger prohibitted to reveal immoral acts to public, either by those who committed that act or by other person as often happened in a Muslim society which implements Syari`ah law. Therefore, it is clear that the Messenger did *ijtihad istislahi* to combine the literal texts with the objective to create public welfare as the spirit of a text. The Messenger had given examples just as he continually had dialogue between texts and the human welfare, between text and the context of human needs.

Currently, Muslim society is moving very quickly from one civilization to another, knowledge civilization, technology civilization, culture civilization, political civilization, economic civilization and human civilization in general. The globalization and modernization stream from Europe has raised various religious attitudes especially within Muslim communities. Modernity which has raised to the surface the issues of democracy, gender equality, pluralism, secularism, tollerance and freedom of religion or not to have religion and other contemporary issues have questioned the religious doctrines which have been accepted and believed as the truth. The issues of modernity have made some Muslim communities, especially traditionalist-fundamentalist Muslims to re-think religious doctrines which they have believed for centuries. In Indonesia the clash between religious doctrine and modernity has led into the birth of various religious styles and behaviors such as the renewal movement of revivalist pre-modernist, classical modernism, post-modern revivalism, neo-modernism, neo-fundamentalism on one side, and the development of the forms of socio-Islamic thinking such as rational Islam, civilized Islam and transformative Islam on the other side. This variety shows how Muslim socities respond and at the same time modify the issues of modernity.[244]

244 For the characteristics of these movements, see Bhudi Munawar Rahman, *Islam Pluralis*, p. 436-437.

In this context, Muslims who live in this century must do the *ijtihad,* to rethink how to implement religious texts, religious values and principles in Indonesian contexts and in the context of the modern world. *Ijtihad*, as argues by al-Qaradlawi, is not to destroy and neglect the existing body of knowledge which has been built well for hundred and even thousand years by the best generation in the past. The new *ijtihad* is not to neglect the products of the exegetes and not to neglect ulama understanding of the Hadith. New *ijtihad is to re-new the fragile ladder-steps and to add new ladder-steps to arrive in the height and excellence of civilization in order to create the public welfare and goodness for all human beings.* According to al-Qaradlawi, what it means by *ijtihad* in the current era is the *ijtihad* which follows the following principles:

1. To understand, think and rethink the products of *fiqh* (in its broad meaning) which are very rich contained in various schools (*madzhab*), especially the opinion of the companions (*sahabat*) and the followers of the companions (*tabi'in*), to choose which opinion is the most rellevant for the current human need,
2. To return to religious sources and to understand well and deeply the aim of Syari`ah (*maqhashidu asy-syari`ah),*
3. To do the *ijtihad* for the new issues which have not been done and known by the previous *fuqaha*' in the past by following the values and the principles stipulated by religious texts of Qur'an and Sunnah because they contain solution for all human problems and the remedy for all illnesses of human body and especially human heart.[245]

The problem is that some Muslims are often careless and incomprehensive in reading the texts. For example, in responding to the issue of whether or not the person who changes his/her religion should be sentenced to death, some ulama believe that the person should be sentenced to death. Other ulama argue that if the person is male, then he should be sentenced to death, while if the person is female, then it is not obligatory to punish her with death penalty, as argued by Abu Hanifah. The first argument is based

245 Yusuf al-Qaradlawi, *Syari'at al-Islam,* p. 78.

on one hadith "whoever change their religion, kill them" (HR. Bukhari).[246] However, the first opinion ignored other two hadiths which require that the death penalty for those who change their religion is only fo those who leave their group (*jama'ah)(al-mufariqu li al-jama'ah*) and fight against Allah and the Messenger *(rajulun yakhruju mi al-islam fayuharibullaha wa rasulahu*).[247] In fact, if the three hadiths are being combined textually by using the theory of *hamlu al-mutlaq ala al-muqayyad*, [taking the general into specific], then it can be concluded that "A person who changes his/her religion (*murtad*) can only be sentenced to death if he/she fights against Muslim society". This means, if the person changes his/her religion because he/she is in doubt in what he/she believes, not because he/she wants to fight against Islam, then it is not allowed to kill him/her. The argument which states that the person who change his/her religion (*riddah)* should definitely (*mutlaq)* be killed is lack of comprehesive reading of the texts, especially the hadith texts, and even more the Qur'anic texts. Thus the real problem of Muslims is not the inability to put into dialogue between the texts and contexts, but their incomprevensive nature of their understanding of (several) texts.

As a result, even though the punishment of flogging is explicitly stated in the text, there is an open room for *ijtihad* to decide how the mechanism, requirements and aims of its implementation in order to be suitable with its contexts as exemplified by the Messenger pbuh. Comprehensive understanding in reading the whole religious texts which discuss one topic and relate them with the public welfare is non-negotiable in order to implement Islam as the blessing for all universe.

246 Ibu Hajar, *Bulugh al-Maram,* p. 255.

247 Ibnu Hajar, *Bulugh al-Maram,*p. 245.

Chapter Seven

Conclusions And Recommendations

A. Conclusions

Syari`ah is a concept that is undergoing a significant development. The Qur'an uses this term in a very general meaning: the teachings of Allah brought by every messenger, so that there is the Syari`ah of Moses, the Syari`ah of Jesus, and the Syari`ah of Muhammad peace be upon him. Syari`ah then is understood as the teachings brought by the Prophet Muhammad, which consist of monotheism or *tawhid* (*al-ahkam al-i'tiqadiyah*), moral teachings (*al-ahkam al-khuluqiyah*), and applied teachings (*al-ahkam al-amaliyah).* These three aspects of Syari`ah are connected with each other in which monotheism cannot be separated from morality and law, morality cannot be separated from monotheism and law, and law is tied with morality and monotheism. In further development, Syari`ah is identical with only one of the three aspects, law (*fiqh*), separated from monotheism and morality. Syari`ah is also often regarded as identical with criminal law, which actually is part of Islamic law, and even regarded as identical with *Qishas* and *Hudūd* which actually is part of Islamic criminal law.

The development of the term 'Syari`ah' affects Muslim society's awareness in understanding the term 'implementation of Syari`ah law' or the Syari`ah brought by the Messenger Muhammad. The implementation of Syari`ah law by emphasising certain aspect, for example, only law aspect, while neglecting the aspects of monotheism and morality can lead into imbalance, especially when the morality of the ruler is being neglected. The implementation of Syari`ah law becomes sharp, firm and harsh to the weak members of the society, but

obtuse and forgiving for the rulers and their staffs who take control of the law implementation. Women and the poor are the most vulnerable social groups in various countries which implement hudūd by neglecting the importance of morality and the monotheist commitment which actually requires protection over the weak *(dlu'afa)* and the weakened groups *(mustad'afin)*.

This study does not specifically differentiate the meaning of Syari`ah and *fiqh*, but it gives information that what is often being called non-negotiable Syari`ah is actually the result of ulama's understanding (*fiqh*) which is bound to certain place and time when this understanding was expressed. This study also confirms that either Syari`ah with broad meaning or Syari`ah with narrow meaning (*fiqh*) still opens the room for reinterpretation (*ijtihad)*, either *ijtihad bi tahriji al-manat* and even *ijtihad bi tahqiqi al-manat*.

Democratic government system requires public support to gain power. In Muslim majority countries, Syari`ah law becomes something effective to gain this support. Strong religious sentiment causes people especially the weak members of the society, generally give support voluntarily or involuntarily to those who promise them social welfare. Unfortunately, after the support was given and the Syari`ah law is implemented, instead of being the target group to receive social welfare, they become the most vulnerable group in the implementation of Syari`ah law, which is not being applicable for all. On the contrary, the stronger political motive rather than monotheist awarness and Islamic morality has led the implementation of Syari`ah law including *hudūd* becomes obtuse for the rulers and their friends who take control of the implementation of the law.

The position of Islamic criminal law (*jinayah*), especially in a country which has its own civil law and criminal law, often becomes apart from the philosophy of law of the country which is related with democratic government system. Consequently, the women who have been acknowledged by modern law system, either as witnesses or as judges, are being subordinated because they are not being acknowledged as judges and their testimony is only being valued as half of the male testimony or not being valued at all. Similarly, women who have received protection as the rape victim from the modern state positive law can be regarded as committing zina because of the view that

women are the source of disorder and their weak position as the witness and the victim, and because of the difficult process of giving evidence.

Other than being apart from the philosophy of the state law, the implementation of Islamic criminal law, especially in the state who has its own law system, is also apart from the philosophy of Islamic law. As a result, punishment is given for the sake of the implementation of the law, not for the sake of public welfare. For example, the implementation of cutting the hands of the thieves is apart from the state obligation to provide economic security system in Islam through the management of public wealth from alms and charity which can prevent someone from stealing because of hunger. Similarly, the punishment for adultery is apart from the marriage and family system in Islam which positions husband-wife and parents-children in equal and just position so that the society can fulfill their sexual needs legally, with healthy and dignified way.

Islamic criminal law in a modern state is regarded in the same way as the act (*undang-undang*). Islamic criminal law is proposed, debated by the parliamentary members and has to be approved by the chair of the parliament and the government. Different from the past Islamic criminal law which was drafted by competent Muslim jurists (*fuqaha)* who had various opinion, including on *hudūd* as discussed in this book, the final decision of Islamic criminal law in the form of bylaw, enactment, ordinance and act, is not on the hands of the competent Muslim scholars, but rather on the hands of the politicians in the parliament. Muslim scholars either from Islamic boarding schools or Islamic higher institution can only give suggestion. The same with the nature of the act, Islamic criminal law enacted as positive law cannot accommodate various opinions which are developing among both classical and contemporary Muslim scholars. Act can only accommodate one certain opinion for the sake of legal certainty.

The implementation of *hudūd* in current Muslim countries has the same law pattern because the formulation of the Islamic criminal law refers to the same reference: it is formulated by the classical Muslim jurists (*fuqaha*). It has also similar problem in its process: the absence of public participation in the formulation process, the elimination of different opinion for the sake of

legal certainty, the court procedure which is not going well, the absence of mechanism for individual and social forgiveness and the minimum system for the protection of victims. Consequently, *hudūd* is not only like 'the sharp knife for bottom part (the people) but obtuse to the top (the ruler)', but also is not in line with the Islamic principles and the aims of Syari`ah (*maqasidu al-syari`ah)*. This is of course contradictory with the spirit of *hudūd* which is actually the maximum punishment prioritized for the perpetrators of serious crimes which are generally being committed by the state ruler on political, economic and cultural affairs. This is even more contradictory if the implementation of *hudūd* re-victimizes the victims of crimes as commonly happened to the rape victims and the political opponents of the ruler.

The application of Islamic criminal law in countries which fully implement Islamic law has its distinctive dynamics. As an act, Islamic criminal law cannot be separated from the law system in those countries. Hierarchically, acts, including Islamic criminal act, are below constitution. In an Islamic sultanate, the criminal act gives special position to the ruler. In an Islamic kingdom, judges are appointed by the ruler, so it is difficult for them to decide punishment for the kings and their family when they are found guilty. There is imbalanced power relation in the implementation of Islamic criminal law in various countries, which ideally is being implemented equally to both the people and the rulers. The different between what happened in the sultanate or kingdom, the priviledged group is stagnant, while in the democratic country, the the priviledged group may change with the change of the rulers.

There are at least four vulnerable groups in the discriminatory implementation of Syari`ah law: the poor who do not have access to justice, women who tend to be treated discriminatorily, political opponents of the rulers, and other minority groups. This leads into the effort to re-understand the concept of *hudūd* by modern Muslim scholars which actually has been done by the classical scholars. Unfortunately, all of these studies by both classical and modern scholars do not receive much attention, especially in the countries who do not implement Syari`ah law. Meanwhile, when the Syari`ah law is formally implemented, there would be no other opportunity to discuss it well.

The challenges of implementing *hudūd* in a modern state is that there is a belief that *hudūd* is the law given directly from God and the Messanger Muhammad pbuh. This book, however, shows that *hudūd* is a contested concept which has many debatable aspects. The Qur'an itself does not specify the word *hudūd* for only criminal laws as defined by *fiqh*. Even in the verses about stealing, robbery, adultery and accusation of zina (*qadzaf)* which are agreed as *hudūd*, the Qur'an does not use the word *hudūd*. On the contrary, *hudūd* is used in the Qur'an to regulate issues related with marriage, inheritance and other issues included in civil law.

The fact that *hudūd* is continually being debated shows that there is a room to re-interpret including to reinterpret it by using humanitarian perspective in which *hudūd* is understood as a response to the existing way of giving punishment among Arab society at the time of Qur'anic revelation. Therefore, *hudūd* is not something new introduced by the Qur'an, but a response to the tradition of Arab society in dealing with cases of murder, injuring and other crimes. Other Qur'anic verses which also respond the factual condition of Arab society at that time are verses about slavery, polygamy, inheritance, wife beating, which have been discussed in other books. In other words, the Qur'an does not bring the new Syari`ah, but regulates the existing issues in order to be in line with the universal principles and the needs of Muslim society at that time. Contextual approach to these verses and the verses on *hudūd* will show that the practice in Arab is not the universal ideal condition, but temporary ideal condition which contains universal ideal message of humanizing human being (*ta'nisul insan*) or to treat human being in dignified way (*takrim insaniyatil insan*).

As other verses about slavery which are being understood as having the main message of creating human equality through liberating slaves, and that the main message of the verse on polygamy is to stand for justice in the family which is actually difficult to be achieved in polygamous marriage, the verses on *hudūd* can also be understood as having the main message of creating fair and humanitarian order. This can also means that when there is possible condition, especially when the practices of slavery, polygamy, *qishas*, and *hudūd* contain injustice, the just principle which becomes the essence of

all teaching about these issues should be maintained even with the different way, as happened on the issue of slavery which is no longer being acceptable among Muslim societies.

One important thing that need to be considered is the choice of any law system, either the law system derived from careful understanding of religious text directly or from the experiences of standing for justice, or from both, should ensure the society welfare in general, formulated through the fair process and implemented in dignified way.

B. Recommendations

Based on the above findings of this study, there are several recommendations:

1. It is recommended to study *hudūd* in interdisciplinary ways both its concept and practices. This is very urgent because the trend to implement Syari`ah law with the implementation of *hudūd* has come to Indonesia, in Aceh Province. It is very urgent that the study on this topic is undertaken well, with the cool heart and mind, and academically honest and open mind.
2. To use interdisciplinary academic studies as the basis to respond to the development of the implementation of Islamic criminal law wisely and thoughtfully and to make the state constitution as the basis to response and protect the society from various forms of discrimination, in the name of both the state law and the religious law.
3. To encourage women's movement to pay attention especially to the cases of discrimination in the name of religion, which are related to the application of *hudūd* in various countries so the relevant data could be given to the government as the basis to respond the development of this problem in Indonesia.
4. To encourage the government to do research and to have continuous dialogue with progressive Muslims about the system of fair, wise and humanitarian law and punishment.
5. The government should see that death penalty (*qishas*), *hudūd*, *rajam* and *ta'zir* are ways or media to achieve justice and public social welfare. Therefore, if a punishment is contradictory with the values of justice,

humanity and human rights, the government (as the representative of God and the representative of the society), should find other alternative ways of punishment which are beneficial for society.

Glossary

Ahlul Hisbah: A group of persons appointed by a ruler (*imam*) to maintain people's interests, ranging from keeping market balance and the authority of the state's law to efforts to maintain social order and unity (*Ma'alimul qurbah fi ahkam al-hisbah*).

Ayat Madaniyyah: Verses of the Qur'an revealed after the Prophet's migration (*Hijrah*) to Medina even though the verses were revealed to the Prophet outside Medina.

Ayat Makiyyah: Verses of the Qur'an revealed before the Prophet immigrated to Medina.

Azali*:* Entity that doesn't start with nothing or that is never inexistent (*Ta'rifat*)

Baghy*:* Rebellion against a ruler

Dhihar*:* A husband equates his wife with woman forbidden to marry (*Mughiny al-Muhtaj*)

Diyat*:* Financial compensation

Fahisyah*:* Very bad and vile deeds. In the Qur'an, the word *fahisyah* is used, among other uses, to mention fornication and sodomy (*Al-Kasyyaf*)

Fiqh*:* The practical rules (*al-ahkam al-'amaliah*) which govern the conduct and behavior of *mukallaf* such as rituals, wedding, transactions, taken from the texts of the Qur'an and Sunnah or from general principles and objectives of *Syari`ah*.

Fujur*:* Lawless; mentality of a person which cause him or her to do things contrary to the rules of law and honor.

Fuqaha*:* The plural form of *faqih*, that is, those who have expertise and deep knowledge in *fiqh* (Islamic law).

Ghair Muhsan: unmarried people

Ghanimah: Treasure taken from enemies of Muslims during war.

Haq al-Adami: Linguistically means "Adam's rights". In *fiqh,* it means *haq al-syar'iy,* a law aimed at maintaining and realizing individual's well-being in particular. Its antonym is *haq al-Allah*.

Hayawaniyyah: animal traits; behavior of people who act like animals.

al-Hasad: Malice, that is, an attempt to make a person suffer.

Hijra: The migration of the Prophet Muhammad and his followers from Mecca to Medina in 622 A.D.

al Hiqd: A desire to seek revenge or prejudice against others as a result of hostilities (*Ta'rifat*).

Hirabah: Literally means robbery, burglary, or armed robbery. Terminologically, it means a blatant and direct intimidation to seize property or kill its owners in an isolated place (*Bada'i al-Shanai*').

Hudud: Literally means limits. It is the maximum limit of punishment to certain crimes. It is often understood as a set of penalties that have been prescribed in *Syari`ah* for some specific crimes.

'Idda: Linguistically means waiting period, that is, a period when a woman may not marry another man after a divorce or the death of her husband.

Ihshan: Literally has the same meaning with *'iffah*, that is, attempt to preserve someone's honor from things that are forbidden according to *Syari`ah*. Someone who is characterized with *ihshan* is called *muhshan*. In the context of adultery, a plaintiff can only be punished if the person being accused of committing adultery is *muhshan* (reticent from misconducts).

Ijma: Agreement or consensus of law by all the *mujtahid* after the death of the Messenger of God.

Ijtihad Istishlahi: An *ijtihad* (a process of making a legal decision by independent interpretation of the legal sources, the Qur'an and the Sunnah), based on *maqasid al-Syari`ah* (general purposes of Islamic law legislation).

Ijtihad bi tahriji al-manath: An *ijtihad* centred on the efforts to seek messages, or legal meanings hidden in the texts of the Qur'an and the Sunnah.

Ijtihad bi al-tahqiq al-manath: An *ijtihad* which seeks to extract, connect and articulate messages and meanings that have been studied through *ijtihad bi tahriji al-manath* in the present context.

Ikhtilat: Intermingling between different sexes (normally young and unmarried) in closed or open areas.

Irtidad/Riddah: Apostasy

Istihsan: Linguistically means "look better". In *fiqh*, *istihsan* refers to leaving *qiyas jali* by taking *qiyas khafi*, or choosing a law in *juz'iy* (particular) while leaving a law in *kulli* (general) because of consideration of achieving benefit with *qiyas khafi* and law in *juz'iy* .

Istiqra': A kind of inductive research; observation of particulars in order to achieve a generalized conclusion.

I`tikaf: Staying in a mosque for a period of time.

'Iffah: Abstain from doing anything inappropriate or prohibited. A person characterized with '*iffah* is called *'afif*.

Jarimah: Criminal acts; God's prohibitions whose violators will be sentenced to *had* or *ta'zir*. *Jarimah* is more common than *jinayah*. (*Al-Ahkam al-Sulthaniyah*)

Jinayah: Harmful acts against someone's property, body or honour. In contemporary *fiqh*, *jinayah* is often translated as Islamic criminal law.

Jumhur Ulama: the majority of Islamic religious authorities

Kaffarat: Expiation, ransom, in the form of good acts or good service to the community. They are required to atone for violations of certain regulations of *Syari`ah* such as fasting for two consecutive months for having sexual intercourse in the day of Ramadan and liberating a slave for breaking oath.

Khamr: Liquor extracted from wine; intoxicated drinks prohibited in Islam.

Kharaj: Land taxes which must be paid by infidels whose land is part of an area conquered by Muslim force or by those who live a region which makes a peace treaty with a Muslim conquering country.

Khulu': Divorce initiated by women.

al-Kibr: A trait in which the person wants to show off his/her height in taste and status. This nature is good and commendable if attached to Allah, but reprehensible if attached to human (*Al-Furuq al-Lughawiyah*).

al-Kidzb: A lie, that is, inconsistency between what is said and what is believed to be a fact (*Jam'ul Jawami'*).

KUHP/Kitab Undang-Undang Hukum Pidana (the Criminal Law Act)

Li'an: A vow made by a husband or wife to avoid a law *had* due to accusation of his or her partner of committing *zina*. The content of the vow must justify accusations and accuse the partner has lied, articulated four times, ended with a saying: "May fury and curse of Allah fall on who has lied".

Liwath: Sodomy (*Nihayat al-Muhtaj*)

Madharat: Something that is not beneficial, harmful, or not profitable that must be avoided.

Mafsadat: Damage or adverse consequences of an action.

Majazi: Metaphorical meaning; deviation of meaning of a word from primary meaning to secondary one.

**Maqashid al-Syari`ah:** The meanings and wisdoms behind all provisions of *Syari`ah*, *i.e.*, human welfare in this world and the hereafter.

Maslahah mursalah: Any benefits not explicated in the sacred texts, or have no special reference to *nash* such as documenting marriage contract, establishing a country and other beneficial matters which are not directly written in the sacred text.

Maslahat: Goodness, safety, and worth, or positive results which become the objectives of *Syari`ah*.

Mauquf: In *fiqh*, this term refers to a private property overtaken by a ruler for public good. In the science of hadith, this term means a hadith narrated from the Companions in the form of all varieties that stalled at the level of the Prophet's companions.

Mu'amalah: Part of *fiqh* that regulates human behaviour in relation to their fellow human beings and his surrounding environment, such as buying and selling, mortgage, leasing, politics, protection of fauna and flora. In *fiqh*, it is often confronted with the term *'ibadah* (worship).

Muhkamat: Quranic verses whose meaning cannot be abrogated and replaced because of their clarity and its explicit allusion, these verses cannot be deviated to another meaning other than their explicit meaning.

Muhsan: Chastity. Linguistically means "a respectable person, married one, or a free human, not slave". It refers to someone who qualify to be subjected in the punishment (*rajam* or *had*) in committing adultery or reckless accusation of adultery (*Mausu'ah Fiqhiyyah*)

Murtad: Apostate

Musahaqah: Linguistically means "rubbing". Terminologically, it is a sexual activity conducted by women (*Al-Zawajir 'an Iqtiraf al-Kaba'ir*).

Naskh: Abrogation; cancellation of a law by another law which provides the opposite legal policy (*Ta'rifat*)

Qana'a: Linguistically, "a willing to accept". Terminologically, it is contentment with what is availabe to someone or when the expected is not obtained.

Qanun: Universal provision applied to all its particulars so that the particular laws can be known (*Ta'rifat*). In contemporary *fiqh*, *Qanun* is *fiqh* codified and formalized as state law.

Qhath'iy al-dalalah: definite religious evidence

Qazhaf: Accusing someone of good reputation of committing adultery either explicitly or implicitly.

Qishas: A law of retaliation, punishment similar in nature to the type of crime committed by the convict, such as killing is punished by killing or injuring is punished by injuring or eliminating any bodily functions.

Qiyas: Enforcing the ruling of cases which have reference to *nash* on other cases that do not have a textual basis due to the same *'illat* (legal reasons).

Rajm: Stoning to death. It is a punishment by throwing stones with predetermined size to *muhshan* adulterers to death.

Risalah: Transformative mission; a set of God's laws brought by His messenger to renew and improve previous divine laws (*Al-Baidhawi fi tafsiirihi*)

Sariqah: Theft

Sunnah: Another name for Hadith, Muhammadan tradition, which is regarded to be the second source of Islamic teaching after the Qur'an. Some scholars differentiate between Sunnah and Hadith in that Sunnah is a Hadith which has become tradition and therefore is regarded to be a stronger source than Hadith whose quality vary from the most acceptable (*shahih*) into the weakest (*dho`if*) quality.

Ta'abbud: God's laws whose meanings, purposes, and lessons are not achieved by human or illogical so that men are required to comply with total submission. The opposite of *ta'abbudi* is *ta'aqquli* or *ma'qulati al-ma'na*.

Ta'zir: The punishment prescribed by a judge or a ruler over a criminal conduct on his or her discretion.

Tajassus: Search and investigation of information for an action plan. In the narrow sense, *tajassus* is lurking, investigating and finding the fault of others.

al-Takabbur: A trait that claim that one's self is grander and nobler than others (*Al-Tauqif 'ala al-Ta'rif Muhimmat*)

Tawadhu': An attitude of humbleness before others; often considered as the opposite of *takabbur*.

Thalak: Divorce initiated by men

Uluhiyyah: Divinity.

'Uqubah: Impact or effect; in Islamic criminal law, *uqubah* is a punishment implemented physically and psychologically, or on property, on people who violate, or do not fulfill, their obligations.

'Urf: Derived from the word "*arafa",* meaning "to know". In *Usul Fiqh, 'urf* is synonymous with *ma'ruf*, that is, tradition or customs already implemented and well-spread in a community both personally and collectively.

'Usyr: Portion of alms taken from agriculture and other natural resources; excise (in trade) imposed on unbelievers.

Wara': Avoiding things which are unclear whether *halal* or not in order to protect one's self from doing forbidden things. It also means a consistency with commendable deeds (*Ta'rifat*)

Zhanniy al-dalalah: conjectural religious evidence

Zina: Adultery or fornication

Zina muhshan: Adultery

Zina ghoiru muhshan: Fornication

Zuhud: An attitude of aversion against the world; attitude of evading worldly pleasures in pursuit of enjoyment in the Hereafter; a person's hatred of the world although he or she is a wealthy. In *tasawwuf*, the definition of *zuhud* is varied.

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Appendices

A. Discussants

Prof. Dr. H. Ali Yasa 'Abubakar, MA

Prof. Ali Yasa Abubakar was born on January 12, 1953. Working experience: advisor to Regional Chairman of Muhammadiyah Aceh from 2015 to 2020; chairman of the Consultation Board of Syari`ah; head of Muhammadiyah Central Aceh; head of Department of Islamic Syari`ah Aceh; rector of the College of Teacher Training and Education of Muhammadiyah Central Aceh (STKIP-MAT); rector of the University of Ar Raniry 2000-2001; director of Post-Graduate Studies, IAIN Ar-Raniry; and actively involved in various activities such as seminars and researches.

Comments

- The study should be placed on the right category: positive law, *fiqh* or Syari`ah to ensure what subject to be researched and what facts to be studied.
- In 2014, the *Qanun* revision, which mentioned in this research, was ratified by the provincial parliament and was endorsed by the Government, while the procedural law passed in 2013. Thus, the law governing criminal law is already legitimate. In this case, Aceh may be different from others. Aceh is not *mazhab*-oriented. In Qanun there are four things that are held: al-Qur'an and Sunnah; the interpretation of al-Qur'an and Sunnah which would be aligned with the culture of the people of Aceh in particular or with the Indonesian state in general, or it should refer to the rules of the country; interpretation on this understanding will be searched for future-oriented. It should refer to the protection of human rights and gender equality, and consider advances in technology, and remain utilizing old provisions that are considered good and try to find new and better ones.

- This manuscript should contain the principles held in the protection of women and children. Cases of rape and adultery in Aceh are divided into three, namely rape, accusation of adultery, and adultery itself. These three things are already set. To provide protection to women in Aceh, Qanun says that "Anyone who claims to fornicate is not the one who accuses someone of committing adultery. People who commit adultery are those who commit adultery voluntarilyy ", while the rape is not done voluntarily.
- The study should contain the distinction between adultery, accusation to adultery, and rape. There are multiple revisions about law of *jinayat* on rape. For the definition of rape we have discussion with NGOs. Rape is not just of men against women, but also of women to men. Rape is not only targeting the vagina, but also in the mouth, anus and others. The meaning of rape is very wide.
- So is the matter of evidence, the required witnesses to adultery are four people, but for the rape, evidence can be anything, as long as there are 2 evidences such as electronic evidence, witnesses, statement, oath, and expert witnesses. To protect women, one proof and one female oath are considered ready to be submitted. However, for weak evidence like this, then the charges could be canceled by oaths. Because otherwise it would be very much feared that many would denounce the accusation of rape to adultery. These are changes that have been made. To protect women from this problem, if a woman gets pregnant after committing adultery, she can do DNA tests as evidence to get the responsibility [of her partner].
- The study should also contain a snapshot of the problem of women's testimony, in which a woman's testimony is considered equal to the testimony of men. It is different from the previous qanuns.
- The study should also update the related changes that have been made by Aceh, as in the problem of *rajam* (stoning). In preparation of qanun, it was not there, but once we did the discussion with other parties, it was asked for stoning to be included as one aspect of the laws. Many things are not yet clear about the stoning, so it cannot be enforced, the

local government and many Islamic scholars (*'ulama*) themselves do not accept it.

- Among the problems discussed in this research; many scholars agree that there has been a change of meaning. They consider it *fiqh* and not Syari`ah. So with that statement that *fiqh* cannot be changed should have been erased. In the present context, how comes the thought that *fiqh* cannot be changed? Those who think that it cannot be changed are the practitioners, not the scholars. Understanding through al-Quran and Sunnah, that it can be changed, the core of discussion is not there anymore but on what must be changed.
- The research focuses on punishment, but not on its definition. Actually, if we look at the definition, we do not need to be worried with punishment of a cut hand. We can make the definition that would not include it. Perhaps on adultery, our interpretation is very limited but on the theft we can be quite extensive.
- In Klantan and Brunei qanun is not yet legitimate because there is no procedural law. In reality in this community, qanun has not been applied. Malaysia and Brunei were very rigid when they were writing the qanun, they faced difficulty. Therefore, in Qanun Brunei, regulation about theft is the same with what is in *fiqh* and so they may have legal dualism. Qanun Klantan doesn't regulate rape. In this study, it is stated that rape is equal to adultery, but it is not. Qanun Klantan doesn't regulate rape. Rape is included in the affairs of State law, while Qanun only set about adultery.

Prof Dr Sulistyowati Irianto

Born in Jakarta, December 1, 1960; director of Post Graduate program, the University of Indonesia. Education: Doctoral degree in Anthropology of Law, UI (2000), Master in Anthropology of Law, UI and the University of Leiden (1989), S-1 Public Administration, Faculty of Social UGM; Professor in Anthropology of Law, Faculty of Law (2008). Professional organizations: Secretary of the Indonesian Teachers Association (since 2013), Member of the Board of the International Commission Pluralism Law (since 2006), Member

of the International Commission on Customary Law and Legal Pluralism (since 1993). Prof Sulityowati teaches in various courses and faculty in the UI, Police Staff College. She received various scholarships and fellowships internationally, various scientific awards since 1987, conducted 16 research since 1989, writing 15 books and 28 papers for international conferences.

Comments:

- I will not see this study as a dissertation, because if so, I'll give you a lot of notes. I will instead give appreciation to this writing, because this is an important research and very helpful. It gives knowledge about how the practice of *hudud* in some Muslim countries including Aceh. I will appreciate this study as a well-designed work.
- I think this study has successfully demonstrated women's experiences in relation to the law. It's in the text of the seventh century and now in the 21st century. The text should be understood temporarily and spatially. At that time it was not possible that the experience of the women considered. Then, this research with all their notes shows how the implementation of *hudud* could harm women, how women are positioned in the text, and that the principle of humanity is not considered. The implementation of *hudud* in some Islamic countries have indicated the condition as such. Not only detrimental but also harmful to women. How a rape victim even experience torture. It has the potential to eliminate life with flogging and stoning.
- As I am not an expert in Islamic law, I will only add a few points. From a socio-legal perspective, it is part of a legal science which studies how the laws work in the community. In the process of making law and its practice, it can be recognized that law is the text with multiple interpretations. It reads like what and how it is practiced really depends on who is making the interpretation and for what purpose. From this text we can see the formulation of regulations or Qanun in Aceh. Identified by Komnas Perempuan, that there are 365 discriminatory policies and some of them are nuanced criminal. There is very strong political nuance. Political interests are formulated in the local regulations.

- In the writing of the law, how the law is defined differs from how the legal scholars define it. Law scholars dwell on what is allowed and prohibited. Scholars stop here, but from the perspective of anthropology of law, the law also provides cognitive conception. Stealing, corruption and *zina* is prohibited. The state law, tradition, Islam, customs, all forbid them. However, how cognition about adultery and theft can give space to the occurrence of interpretation, such as interests, socio-cultural context, cultural? Thus, there is always another concept. That is what I want to express.
- Legal pluralism has become an approach, because it gives criticism on legal centralism. Then, due to the fact when a country in Asia became independent, it turns out there's a lot of sides of the law left by the colonial state, as our Dutch heritage has. It is essentially the same. In the Netherlands, the law itself has been revised many times, while in our country not yet. Legal pluralism is understood as the coexistence of multiple legal systems within a particular social arena. The researchers identified in the law of inheritance, marriage and resource management thatthere are various laws. However, this approach has been a correction for the new developments, particularly as globalization and advances in communication technology, in which these advances allow people to move from one position to another by bringing system of thinking as well, and the legal system as well. Thus, in the current terminology, legal pluralism is coexistence of international law, trans-national, and national law in the country, where there is a state law, customs, religion and so forth.
- That the legal pluralism in the early period is intended to make revisions to the state, saying that state law is not the only law that monopolize our actions, tut here, we can also see the concept of legal pluralism that religious law as not the only law that governs us. There is always the complexity that occurs because of a mix of various legal spheres. It should be understood that the existence of laws that varied in one arena makes that its entity is not clearly identified because when these laws encounter with each other, they enter into the process of adaptation and contestation,

adoption and also would produce and reproduce. Mr. Taher said just now that in West Sumatra and Aceh, it is hard to differentiate between the two, which one is the tradition and which one is religion. Ruling District court in West Sumatra also showed that 99% of cases in West Sumatra were decided by the District Court referring to the contents of customary law. In this case, the customary laws are adopted by the state.

- My own research is unique, I have collected 109 cases of the Constitutional Court (*Mahkamah* Konstitusi [MK]) for nine years from 2000-2009. In the area such as West Sumatra, which certainly Muslim territory, none of the cases of inheritance is settled in the Religious Court. All of them are settled in the District Court; this is because people of Minang said District Court is the guardian of our customs. They are matriarchal, if they are settled at the Religious Court, the trial will not follow the custom. This kind of uniqueness should become our awareness too.
- In Act 50 of 2009 on the Religious Courts stated that all the people who are Muslims when dealing about inheritance should go to Religious Courts. Then how about religious values that are being adopted by state law, it is clear in the legislation of Marriage. Then how about international law whose spread cannot be stopped, ratified by 170 countries including us. For example, the Domestic Violence Act was elaborating CEDAW, either partly or wholly through ratification. Globalization occurs also in terms of the law. All laws meet each other and produce the new law.
- Be careful in seeing international law as western law. CEDAW for example, it is formulated by delegates from developing countries, where they saw the condition of women in their respective countries. CEDAW is the Convention of delegates made in eastern countries, including Indonesia. Earlier of what presented in this study says that *hudud* is contradictory with various international legal instruments such as CEDAW, the Convention of anti-violence against children and others, so that comes a debate and discussion in order that it can do further research. It is highly recommended that research can be made more empirical in nature, so go into the field, start from Aceh, it would be good if there is a research on how society responds to Aceh's Qanun. Aceh is not homogenous, there is

a diversity of sub ethnic, class, gender; how they respond to it. How about when it is applied. A study can be made about those who experience of being flogged.

- I recommend to read a dissertation on the research about the application of Islamic law in 12 states, in which the researcher shows the diversity and that is legal pluralism. We cannot restrict that the law is just one. How Islamic law was responded and it is actually verycompromising. Scientists and researchers should be sensitive that it [Islamic law] must be redefined because as a text, within times, humans respond to it differently. The perspective of justice and humanity should be built.
- The aim of this study is to urge a new awareness to respect women's human rights, and basic human rights, that every person deserves equality before the law and is not subjected to torture and humiliation.

Prof. Tamrin Amal Tomagola

Prof. Tamrin Amal Tomagola was born in Galela, North Halmahera. Education: Elementary school (1959) in North Halmahera Galela, SMP Ternate (1962) and SMA Ternate (1965). Enrolled as a Bachelor degree student in sociology UI while worked as assistant to Vice President Department of Public Welfare Affairs (1978-1983) Affairs and in postgraduate degree in Canberra, Australia with a specialization in social demography. Graduated in 1982 with a thesis entitled: *Educational Differences in West Java and West Sumatra: Socio-historical Perspectives*. He also had some training in statistical science at the Netherlands. He gets his Ph.D. in 1990 in United Kingdom with a dissertation titled *Indonesian Woman Magazine as an ideological Medium*. He is active in various fields, such as national and international seminars; as a guest speaker at the Asian Conference on Diversity and Coexistence in Sri Lanka in 2003, Regional Workshop on Indigenous Peoples and Poverty Reduction organized by ADB, Manila, 25-26 October 2001, International Workshop on Political Violence in Asia in Oslo, Norway in 2000, ESCAP Meeting on Culture and The Care of the Elderly, Bangkok 1998.

Comments:

- When I read this study, I had the impression that arguments the authors stand look defensive and give an overview about the diachronic Islam. When I read this, the focus of this research is still not out there. Strictly speaking, the initial point of departure directly refers to the messages of *fiqh* as the most powerful foundation for the basic human rights in Islam. It needs not to be defensive or apologetic that concepts of Western Human Rights have entered into Islam or the other way around, I think it's not necessary. It was over. Defensive argument is already past. Argument by Tariqh Ramadan is invalid. His arguments, taken from Islam, include *don't destroy right, don't destroy property, and don't destroy dignity*. This humanist face of Islam should be explored and developed, so that it shows its humane face. It's not something to be contested by western human rights.
- The research theme "Towards a just and humane religion", seems not to have a footstool. Why? Because in terms of religion, one needs to interpret it through sociology of culture. Religion is interpreted in the five forms: a) Religion as a doctrine. This is what was studied by these researchers. This study involves various norms in religion; b) Religion is defined as an institution. In this study, I don't see a study on that institution whatsoever. It is mentioned the time of the prophet but the prophet's own institution is not visible. Institutions in the sociology of religion are referred to as the structures of the individual who makes a doctrine to become a clause, to *make sense*. For example, you cannot just stop at doctrine, you must delve down to the individual structures. For instance, as mentioned earlier, a reference to the time of Prophet Ayyub, what's social and religious institution that support his teachings? It's not there, it's just a quote and doesn't dive down; c) Religion and adherents, where the sociology of culture refers to people. The combination of the institution and the people is the core. I don't see this point, the two main pillars that support the emerging religion; d) Religion as a symbol (*icon*). Some people used a picture of a crescent moon, while others a cross. That's symbol. Mosque is full with a particular form of symbols; and e)

Religion as a commodity. As economic and political commodity. There actually happened in the past certain type of political Islam.

- I think if Komnas Perempuan wishes to pursue a study like this, then the road to be traversed will be very long and winding, because it begins very well with reference to what happened in Aceh, but it must be accompanied with another Islamic community and hundreds of others in *Nusantara* (Indonesian archipelago). In terms of ethnicity, only we who have more than 600 tribes, with their own natural religions. There are shortcuts that can be taken, through 10 areas: Aceh, Batak, Minang, Malay, Javanese, Balinese, Madurese, Sundanese, Bugis and Chinese descendants. Here are 10 groups which are very decisive. These are the prominent groups in Indonesia. Try to prioritize these 10's. The study has already begun with Aceh. The researchers also did not refer to Islamic notion of the archipelago. The deepening of the application of Islamic law must be placed in the context of Islam of the archipelago. The study is still like plane up in the sky (still in the definition/doctrines), not yet lands to meet the four aspects to be down the earth.
- This research also needs to expand to include five institutions in the country that are very powerful, such as institutions of traditions, of religion, of the state, of business (capital), and of civil society. It needs to conduct research on areas such as:
  a) The area of Bali. *Adat* (traditions) and the State are separated so that in Bali there is the village refers to tradition and another village refers to the state. State's village affairs are taken care by the government while traditional village affairs are governed by traditional leaders.
  b) The Regency of Solo. Here is where customs and culture as the spirit and the spirit enter into the nutty gritty of local government administration. Customs are included in the State. Now regent issues rules regarding indigenous or customary villages.
  c) Regions of Minang and Aceh. In these two regions, customs and religion penetrate each other so it is difficult to disentangle the two. The state is outside and should not enter the business. It's interesting.
  d) Traditional Council in Kalimantan, Sulawesi and Maluku. No

separation between traditional authority and the State. Governor is working side by side with council representatives of *Dayak*. It blurs in borders between the State and the tradition. In this era of democracy it is very open to the conflict of interest.

e) Area of Baduy in Banten. People there only acknowledge religion of Baduy. Affairs of all other religions and also of the country are outside. The most far-reaching area is Baduy Luar, whereas in Baduy Dalam there is no state religion.

Nina Nurmila , Ph.D, Commissioner of Komnas Perempuan
Nina Nurmila is a Senior Lecturer at the State Islamic University (UIN) Bandung and is currently one of the commissioners of Komnas Perempuan (2015-2019). Her first degree was from Institut Agama Islam Negeri/IAIN (now Universitas Islam Negeri/UIN) Bandung (1992), her MA on Gender and Development was from Murdoch University (1997) and her PhD on Gender and Islamic Studies was from University of Melbourne (2007). She was a *Fulbright Visiting Researcher* at Temple University, Philadelphia, USA (2000), *Endeavour Postdoctoral Research Fellow* at University of Technology, Sydney (2008) and *Fulbright Visiting Professor of Islamic Studies* at University of Redlands, California, USA (2008-9). She was also a *Visiting Research Fellow* at the Religion and Society Research Centre of University of Western Sydney (2013) and University van Amsterdam (2015). Nina is the author of *Modul Studi Islam dan Gender* (PSW UIN Jakarta, 2008) and *Women, Islam and Everyday Life: Renegotiating Polygamy in Indonesia* (London; New York: Routledge, 2009&2011). She wrote several articles published in the national and international journals as well as several book chapters published, for example, at Routledge (London& New York), Brill (the Netherlands), University of Amsterdam Press (the Netherlands) and Demeter (Canada).

Comments:

- I disagree with Prof. Tamrin who considers this study as defensive in nature. I do not see it that way. This study actually criticizes the defensive and draconian Islamic faces. Punishment is prescribed precisely out of

context of the present day, and out of the definition of Islam that upholds justice and humanity.

- I agree with the emphasis on the diversity of Indonesia. I also have the same opinition with Prof. Ali Yasa regarding the distinction between Syari`ah and *fiqh*. As a feminist, I have the same opinion with Prof. Sulis, on the importance of integrating women's perspectives and on establishing the legal construction based on the reality of women.
- Komnas Perempuan has a mandate to create a situation conducive to the elimination of violence against women. For example, formalization of Islamic law in Aceh, in the form of corporeal punishment which degrades humanity such as flogging, and other rules tend to be discriminatory against women.
- This study is considered "fresh air" for policy makers and law enforcement and human rights defenders who want law enforcement to be humane and just. Because this study shows the existence of the alternative Islamic law which is more humane and just, which, if disseminated to the public, it could at least change Islam's faces once were grim and cruel become the face that is just and humane, or Islam as *rahmatan lil`alamin*.
- Many aspects in this world are still dominated by male, including the formulation of law. As a result, laws tend to be not in favour of women, especially in relation to sexual crimes (e.g., case of victimization of rape victims in Aceh for difficulty in proving the occurrence of rape). Therefore, Komnas Perempuan, involving many stakeholders such as law enforcement authorities (Aparat Penegak Hukum [APH]), a group of disabled, and many legal experts, is preparing the Draft Law on the Elimination of Sexual Violence.
- This study is important because it is done by two scholars who have gender perspective and the human rights in mind, so that it may come to the expectation to counter the formalization of Islamic legal discourse which is monolithic, conservative and less in favor of women. It could be an alternative new knowledge.

B. Discussions

This page contains the proposal and recommendation expressed in limited public discussion forum. This forum was divided into three main themes: (1) Women in Criminal Law, (2) Women in Adat Law, (3) Women in the Relation between Religion and the State. The participants of this forum formulate problems and give recommendation to solve the problems.

1. Women in Criminal Law

1) An overview of women's experience is important isssue to be a barometer in this study. It will provide understanding and also input, the aim is no other than to protect women from violence. Some issues related to discrimination of women in terms of punishment both in the National Criminal Code (KUHP) and other lex-specialies, where there occurs an increase of criminalization, in about 60% of victims reporting as victims of violence are even criminalized with other crimes, such as defamation, violation of the Law on Elimination of Domestic Violence (UU KDRT), and others. Plus the practice of criminal law itself doesn't provide protection. It is our proposal that it would minimize the legal practices that make any criminal law unproductive.
2) Some provisions in the Criminal Code, such as insentencing seem to be gender neutral, but in fact, it is discriminating against women. Based on the principle written in CEDAW, there is another concept of injustice, that gender netral can be discriminative against women because substantive justice expects that it is not just fair in the process but it should also be fair in the results. How to find the right form of punishment? Let's see who is punished? What structural position a person holds in the community. We can see through anyone being punished. We need to see the position of women in the structure. For example, if someone is placed in a particular environment, we can ascertain of how he/she will behave. Suppose there is a child in a localized compound and being abused, then anyone being abused

would be like that child. Structural position in the society such as gender relations, economic relations or social relationship determine the occurrence of injustice to women.

3) To give an appropriate punishment, we must note several concepts such as non-victimization; no more victimization on the-already-victims. In some specific criminal act the perpetrator is the victim. Suppose the perpetrator was the victim of social injustice, e.g. poor people who are forced to steal, involved in human trafficking, in persons and children. The main actor will be included in the component of participation, whether the initiator or just participator, or even just a servant. He has no criminal motivation but already committed the crime. Which one should be taken primarily when there are several criminal offenses? For example, should we put in the first place victims of domestic violence, who have become victims for decades, or otherwise put the perpetrator of this domestic violence or the victims of domestic violence who stabbed the perpetrator of that domestic violence? thus, we must pay attention to the rule of law and the compliance of legal norms with one another.
4) Another problem is the legal pluralism in Indonesia, where in some areas of Indonesia women is treated unfairly and discriminatively, the law was not the same between the national and the local. One of them is in Aceh. It is in NKRI (*Negara Kesatuan Republik Indonesia*, the integrated Republic of Indonesia), but Aceh has a criminal law of its own, although it isn't that much different from KUHP (*kitab Undang-Undang Pidana*, book of the National Criminal Code), but in some details, it is different.For example, when a criminal offense has been regulated in the Criminal Code, then the non-Muslim citizens can choose where to go, but if it's already set by Qanun, not regulated in the Criminal Code, then they should follow Qanun. For example, a case of a woman who sells alcohol. The Criminal Code doesn't set the provision about it, but Qanun has it. If the actions taken by women of different religions, the process and the penalties would be different. The result is there are different punishments for the same act. We

can see legal dualism occurs here. Another issue is rape, especially when the perpetrator swears that it is not a rape but *zina*. This weaken the woman's position. If it is considered adultery, the woman will be married to the perpetrator. This is actually not adultery, but rape. If adultery it would be assumed that they both do it voluntarily, but this is a case of rape because the procedures to prove the rape is difficult then the woman will be included in the case of adultery.

5) If we look at the evolution on the meaning of punishment, in fact it is retribution, as a deterrent, as well as rehabilitation which contains the principle of restorative justice. For that, several recommendations in the discussion of women and criminal law, we hope that norms, customs and practices of the law may become more responsive to women and more pro-victim. We hope not that the present law may actually harm women.

Recommendations:

1. To ensure the role of the state exist to provide certainty and justice for victims by providing counseling and legal education to brighten the community.
2. To merge criminal and civil cases on cases of domestic violence.
3. To provide a special judicial system for the issue of sexual violence.
4. To provide specific rules to delay the prosecution and execution or other legal proceedings against the women and children to scrutinize the situation and the condition of women victims, for example, female as head of household, nursing women, pregnant and ill, a condition that requires treatment.
5. To provide more access to legal counsel.
6. To ensure the burden of proof not on the victim.
7. To provide code of conduct for Law Enforcement Officials (APH), one such as for the victim from the vulnerable groups.
8. To provide specific rules on the process of investigation and detention against women.

2. Women in Adat Law

1) In everyday life of citizens, there are three legal guidelines: religious law, customary law, and state law. As a country, the diversity in laws really exists, whether in ethnic, religion and other areas. Understanding the mix between adat and religion is widely abused in punishment which actually deviates from its true nature. Komnas Perempuan found many Perda (*Peraturan Daerah;* provincial legislations) discriminatory in the name of religion, particularly to women. In Aceh, the adat law is influenced by Islamic religion, while in Bali it is heavily influenced by Hinduism. There are people who in them religious influence is not that much, as in Sundanese people whose beliefs are mystic or esoteric, such as Sunda Wiwitan and others.
2) According to a study by Komnas Perempuan, violence based on religion started from birth to death. When a girl was born, she would face female circumcision, is this of violence or not? Then she must marry someone from certain group and be banned if she marry someone from outside the group. A woman has to give birth to a baby, but, if she doesn't give birth to a boy, then she should marry another man to have a baby boy.
3) Other examples are the paradigm of the public related to dowry or *mahr* as values, or assumption that women are bought with the *mahr*. Women are treated like commodities, anything may be done to her. In Papua, if the child doesn't go to school, then the husband may hit his wife. In certain cases, if the husband wants to marry again, then the one who should provide the dowry is his first wife. Even when death comes, funeral of the husband in Papua require the wife to cut her fingers.
4) If we look this sequel from life to death, many cases of violence happens to women. Is there a judgment against perpetrators? Culturally there is no judgment because it is part of life or culture that surrounds them. The study has been done in six areas, in West Sumatra, Yogyakarta, Pontianak, Bali, Flores, Mataram and Ambon. In Flores, for example, when there is a rape, if there is punishment then it would

be undertaken openly in public. There are no principles of protection for the victim. In one society, if there is an affairs between a woman and a man, then they should be married off. Thus, marriage is a form of punishment and this is proposed tobe adopted into national law.

5) Another example is in Riau, when a woman is raped, then the offender must pay the customary money; when the money is paid, the case is closed. This also happened in Palembang, the customary money is paid by giving certain cattle, either to women or society. In certain communities, it is not paid to women but to the community. The money is to hold the ceremony, so that the victim doesn't get anything; in certain areas, a woman is even considered a disgrace. In Aceh, women with tight dress is put in jail, it only applies to women. Punishment which we see in these contexts doesn't provide justice to women.
6) There are some major problems in the punishment of Adat and women, such as the position of women and the context of violence based on culture: How the injustice of adat law in the context of justice for women? Why women choose adat settlement rather than national law? Some important points are recommended in this study.

Recommendations:

1. Formal and informal education with human rights perspective, genderequality and justice on victims.
2. Redefinition of Adat law and its institutionalization
3. Constructing and revitalizing Adat courts and Adat Procedural Law with the perspective of the victim and community-based case settlement.
4. Documentation of adat or culture-based violence
5. A recovery system for victims in the penitentiary system of adat and community-based recovery.
6. Advocacy oflegislation related to adat law communities, among others, Bill on Recognition and Protection of the Rights of Adat Peoples (*RUU Pengakuan dan Perlindungan Hak-Hak Masyarakat Adat, abbreviated*

PPHMA), the revision of Law No. 1 Year 1974 on Marriage, Criminal Act and Bill on Culture.

3. Women in the Relation between Religion and the State Relation between the state and religion continues to be the topic of discussion everywhere. Some observers understand religion and the state as in Integrality theory that religion and state are united. There is also a view that religion is needed to give spirit to the state, and religion becomes a protector for the state. This theory is commonly called the theory of mutualistic. There is also a theory of separation between religion and the state, in terms of religious laws, which is commonly called secular theory. In practice, these three theories are very well known in Indonesia.
    1) There are many reasons why we need to discuss the issue of the relationship between religion and the state because there are many issues that become a point of debate between religion and state. Sometimes the state wins and in other times religion is victorious. Sometimes religion lose while in other times the state would lose. Very often both are losing altogether. For example, in the case of early marriage, religion legitimizes it even from birth, but the state forbids it. In such cases, the fight of legitimacy occurs, the position of religion is in endorsing the early marriage while the state is in contending position.
    2. In other cases, such as the matter of the death penalty, which is now being voiced by human rights activists, Komnas Perempuan and other activists request it should be abolished. In the view of the religious organizations, such as NU and Muhammadiyah, death penalty is the price of life, not the price of death. Not to mention the position of religion and state that continues to be debated in the case of polygamy; the state and religion seem to be a liaison to justification. In this perspective, instead of protecting women, it is much more like ignoring female justice.
    3. The debate over religion and state positions until now is getting heated. Indonesian society is so plural in nature that the state should

put minimum position to intervene, but in fact the state plays many roles to give legitimation on the basis of the majority religion. The state should involve to the minimum, except in terms of protecting the rights and facilitating all rights. The position of the state should be in the form of protection efforts in order not to spoil the diversity of people whatsoever. There should be no compulsion and condemnation in it. Things appear problematic when the instrument of the state begins to impose hegemonic understanding of the parties, for example when Shia and Ahmadiyyah differ from Nahdlatul Ulama and Muhammadiyah, in a position like this, the state should remain in facilitating the rights of adherents. When the state entered the realm of violence, the state should protect the country. The state should not judge who and what is right because it potentially breaks the diversity of Indonesia itself.

4. In terms of the judgment, the state must not be partial to class, race, ethnicity or religion, because it is clearly contrary to the constitutional principle of citizens. The state is obliged to provide oversight to the region in the mechanism of local autonomy to fulfil the constitutional rights. The central government should firmly remove all discriminative policies. It must anticipate and control the local government that produces policies that are discriminatory and not in line with the constitution and the human rights.

Recommendations:

1. The 1945 Constitution and Pancasila are the foundation of nationhood and statehood.
2. The state's function is to serve, protect and respect all citizens of Indonesia.
3. The state should not intervene the rights of personal (individual morality, such as wearing certain clothes and others).
4. Lex specialis must not be in conflict with the law and constitution above it.
5. The state must not create any laws or policies that regulate a single religious group, a certain religious group that discriminates other faith

and religions. The state must create laws and policies that govern all citizens.

6. The state cannot regulate public spaces that may reduce the enjoyment of the rights of the citizens, such as the right to worship, belief, civil and political rights and economic, social and other cultural activities.
7. The state is obliged to stop the inhuman punishment which degrades human dignity and to promote public education and create favorable conditions that allow citizens to avoid any violation of laws and regulations.
8. The state should anticipate and control the local government that produces policies that are discriminatory and not in line with the constitution and against basic human rights.

C. Focus Group Discussion and Limited Discussion

1. List of Attendance, Discussion by Islamic Law Experts on Law and Punishment, Jakarta, March 11, 2015

No	Name	Institution
1	Abdul Muqsit Ghazali	Dosen UIN Jakarta
2	A. Hamid Sarong	Dosen UIN Ar Raniri Aceh
3	Ali Mursyid	Dosen UIN Jakarta
4	Azriana	Ketua Komnas Perempuan
5	Abby Gina	UPR Komnas Perempuan
6	Danial	STAIN Malikullah Aceh
7	Dahlia Madanih	Komnas Perempuan
8	Elwi Gito	Komnas Perempuan
9	Erton	ICRP
10	Husain Muhammad	Fahmina Institute Cirebon

11	Imam Nakhe'i	Komnas Perempuan
12	Indraswari	Komnas Perempuan
13	Mahbub Ma'afi	Rabithah Ma'had Islam NU
14	Mawardi	Rahima
15	M. Subkhi	Desk KBB Komnas HAM
16	M. Aqib	Lakpesdam NU
17	Mia Olivia	Komnas Perempuan
18	Moh. Munib	ICRP
19	Nur Achmad	Dosen STIEAD dan UHAMKA Jakarta
20	NurRof'iah	Dosen PTIQ Ciputat Tanggerang Selatan
21	Nina Nurmila	Komnas Perempuan
22	Pera Sopariyanti	Komnas Perempuan
23	Pipit Aidul F	Maarif Institute
24	Putri Ulina	Komnas Perempuan
25	Sri Nur Herwati	Komnas Perempuan
26	Yuniyanti Chuzaifah	Komnas Perempuan

2. List of Attendance, Round Table Discussion (RTD) Reconstruction of Punishment System in Indonesia: A Response to the Research Results "Reinterpretation of Qishas and Hudud: Towards a Just and Humane Order", Jakarta, 6 April 2015

No	Name	Institution
1	S. Aditiya Wijaya	Biro Hukum Kemendagi
2	Husain Muhammad	Fahmina Institute Cirebon
3	Nur Rofi'ah	Dosen PTIQ Ciputat Tanggerang Selatan
4	Veronica Komar	LBH Jakarta
5	Wara Aninditari	Kontras
6	Andy Yentriyani	Dosen UI Depok
7	Azriana	Komnas Perempuan
8	Yuniyanti Chuzaifah	Komnas Perempuan
9	Imam Nahe'i	Komnas Perempuan
10	Riri Khariroh	Komnas Perempuan
11	Nina Nurmila	Komnas Perempuan
12	Indraswari	Komnas Perempuan
13	Indriyati Suparno	Komnas Perempuan
14	Saur Tumiur S	Komnas Perempuan
15	Irawati Harsono	Komnas Perempuan
16	Magdalena S	Komnas Perempuan
17	Soraya Ramli	Komnas Perempuan
18	Dahlia Madanih	Komnas Perempuan
19	Pera Sopariyanti	Komnas Perempuan
20	Rita Fortina	Komnas Perempuan
21	Nike Nadia	Komnas Perempuan

3. List of Attendance, Limited Discussion on Law and Punishment: Reinterpreting Qishash and Hudud towards a Just and Humane Social Structure, Komisi Yudisial, Jakarta, 15 October 2015

No	Name	Institution
1	Misbakhul Munir	YLBHI-LBH Semarang
2	Affan Randi	JMPS
3	Husein Muhammad	Fahmina Institute
4	Norma Manalu	JMPS
5	Yetri Heriani	Nurani Perempuan
6	A. Hamid Sorong	UIN Ar-raury
7	Tumbu Saraswati	Komisioner Komnas Perempuan (2010-2014)
8	Yul Ernis	BPHN
9	Lucia Wenehen	ICRP
10	Fitria Sumarni	Jemaat Ahmadiyah
11	Alfina Rahil Ashidi	IPPNU
12	El Rhoy Paulus. B.S	LBH Mawar Saron
13	I.A Wilson Sanheinish	DPP IMM
14	Indrawati	Otda Kemendagri
15	F Retno	Otda Kemendagri
16	Herawati	Keppak Perempuan
17	Kencana Indrishutari	Keppak Perempuan
18	Muktiono	FH-UB Malang
19	Andi Irawan	The Wahid Institute
20	Sri Suari	Lemhanas RI

21	Iip M Paoz	LKA HAM
22	Susi Arlian	Kemenko Polhukam
23	Yulmi Syafi'i	Ro Hukum KEMENAG
24	Supriyanto	-
25	Sulaiman	-
26	Herman	-
27	Armen	-
28	Iway	-
29	Sutisna	-
30	Jamal	-
31	Jahuta H	LBH Mawar Saron
32	Desiana Smosir	IPC
33	Desiana Smosir	IPC
34	Andi D	Komisi Yudisial
35	Asfinawati	-
36	Cahyu N	-
37	Ramotis	Polhukam
38	Agus Subandrio	-
39	Ermelina S	Ecpai Indonesia
40	Imam Ramdhani	Kementerian Agama
41	Suraiya	-
42	Tuti Widyaningrum	Univ 17 Agustus 1945 Jkt
43	Indrayasari	Lembaga Perlindungan Saksi dan Korban
44	Fatimah Nurya	Lembaga Perlindungan Saksi dan Korban

45	Ali Mursyid	UIN Jakarta
46	Al Z. Abubakar	UIN Banda Aceh
47	Kartika Paramita, SH	Tumbu Saraswati & Associates
48	Imam Akbar	Kemendagri Ditjen Otda
49	Helma Havyani	Badan Litbang Kemenag RI
50	Umi Nuraeni	Bimas Islam Kemenag RI
51	Lady Yulia	Kemenag
52	Novie	-
53	Yanti	-
54	Roni	-
55	Whyuningsih	-
56	Mayon M	-
57	M. Anwar	-
58	Teguh. P	-
59	Iway	-
65	Dahlia Madanih	Komnas Perempuan
66	Damrin	-
67	Sulis Irianto	PIS Universitas Indonesia
68	Masruchah	Komnas Perempuan
69	A. Hamdy	-
70	Indraswari	Komnas Perempuan
71	M. Daerobi	Komnas Perempuan
72	Sondary Frishka	Komnas Perempuan
73	Yuni	Komnas Perempuan

74	Sri Nurherawati	Komnas Perempuan
75	Ema Mukarromah	Komnas Perempuan
76	Martini	Komnas Perempuan
77	Abby Gina	-
78	Mega	-
79	Bella	-
80	Nina Nurmila	Komnas Perempuan
81	Azriana	Komnas Perempuan
82	Saur Timiur Situmorang	Komnas Perempuan
83	Tamrin Amal Tomagola	FISIP Universitas Indonesia
84	Rita Fortuna	Komnas Perempuan

NATIONAL COMMISSION ON
VIOLENCE AGAINST WOMEN

KOMNAS PEREMPUAN

KOMISI NASIONAL ANTI KEKERASAN TERHADAP PEREMPUAN

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ISBN 978-602-330-017-4